



8.5.1 DEMOLITION REQUESTS FOR LEASEHOLD COTTAGES AT PEACEFUL BAY

File Ref:	A3104
Applicant / Proponent:	Shire of Denmark
Subject Land / Locality:	Peaceful Bay Leasehold
Disclosure of Officer Interest:	Nil
Date:	2 July 2012
Author:	Dale Stewart, Chief Executive Officer
Authorising Officer:	Dale Stewart, Chief Executive Officer
Attachments:	8.5.1 a) - Extract Report from Council Minutes – June 2011 8.5.1 b) - Copy of letter to McLeods Barristers & Solicitors 8.5.1 c) - Copy of 'blank' standard Peaceful Bay Lease 8.5.1 d) - Copy of response from McLeods Barristers & Solicitors

Summary:

This report considers legal advice received following consideration of a request by one of the lessees to demolish one of the dwellings on a leasehold at Peaceful Bay in June 2011. Council at the time agreed to support the request for demolition subject to certain provisions being met but noted that such approvals may cause a precedent and also call into question Council's practice with respect to inspection of the buildings from time to time. This report recommends policies for the consideration of Council as a result of that legal advice obtained.

Background:

In June 2011 Council considered a request from the lessees of Site 72 Third Avenue, Peaceful Bay to support the demolition of the existing 'holiday cottage' to facilitate the building of a new 'holiday cottage'. A copy of the report is attached at Attachment 8.5.1 a).

In summary, Council supported the applicant's request, subject to certain provisions, as per Resolution No. 120611 which reads as follows;

"That Council advise the lessee of site 72 Third Avenue Peaceful Bay that it is prepared to consider providing approval as the lessor/landowner in accordance with Clause 6.01 of the lease such that an Application for Planning Approval for demolition of the existing 'holiday cottage' to facilitate building a new 'holiday cottage' subject to the following provisions;

1. *That the applicant demonstrate to Council's satisfaction that the building is in such a state that it is beyond its useful life and generally unfit for habitation and/or economical repair and;*
2. *That the applicant demonstrate to Council's satisfaction concept building plans and elevations of the proposed replacement building that are sympathetic to and conform to the principles of the Peaceful Bay Heritage Precinct Conservation Plan and Town Planning Scheme Policy No. 35 - Peaceful Bay Conservation Plan Development Guidelines (noting that the current submitted plans in the opinion of Council do not)."*

In addition, Council resolved the following (Resolution No. 130611);

"That with respect to the Peaceful Bay Leasehold Cottages, Council request the Chief Executive Officer to have prepared a report on the potential for conflicts or policy direction relating to the lease obligations of the lessor and / or lessee with respect to maintenance, criteria for supporting demolition, removal of improvements at the end of term (of the lease) and the Council's existing inspection regime, Peaceful Bay Conservation Plan and Town Planning Scheme Policy No. 35."

Comment:

Council's correspondence to its solicitors of 7 July 2011 (refer Attachment 8.5.1 b)) details the various implications on how Council deals with subsequent requests for

demolition and/or inspection requirements of the 203 holiday cottages it has under lease at Peaceful Bay.

In summary the issues related to;

1. Whether Council needs to grant owner approval for an application for planning consent prior to considering planning authority approval?
2. Whether an application for planning consent requires owner approval (lessor) or lessee approval?
3. Whether Council could validly refuse approval for demolition either as the owner and or planning authority?
4. Maintenance obligations of the lessee, particularly given the lessors irregular inspection regime, and the resultant liability, if any, of the Council (lessor)?
5. The apparent contradiction of the lease compared to the Conservation Plan, requiring removal of the heritage buildings at the end of term?
6. Seeking guidance on policies that might assist Council in assessing an application for demolition.

Consultation:

A letter was sent to McLeods Barristers & Solicitors on the 7 July 2011 seeking legal advice on the matter of demolition of one of the cottages at Peaceful Bay. A copy of their response, dated 30 May 2012, is attached at Attachment 8.5.1 d).

Aspects of the proposed new Council policies are recommended to be forwarded to the Peaceful Bay Progress Association (PBPA) and lessees together with a copy of the legal advice.

Statutory Obligations:

Any statutory obligations are detailed within the legal advice obtained (refer Attachment 8.5.1 d)).

Policy Implications:

Council recently (in May 2012) created a new Policy with respect to Peaceful Bay Holiday Cottage request for permanency which somewhat answers some of the concerns raised in the legal advice.

Council Policy P100609 - Peaceful Bay Holiday Cottage Full Time Occupancy Approvals, created at the same time, states:

“Objective

To ensure that full time occupancy of Peaceful Bay Leasehold Holiday Lots does not:

- a) Detract from the areas amenity or function as a family holiday home area.*
- b) Place the full time occupants at risk through the usage of substandard dwellings.*
- c) Lead to environmental or public health risks through overuse of the non potable scheme water and or septic tank systems.*
- d) Jeopardise the long term renewal of Peaceful Bay Leasehold Holiday Lot Leases.*

Policy

The Chief Executive Officer is delegated authority to approve full time occupancy on a case by case basis subject to the following conditions being imposed on each approval:

- i. Advice to the applicant that Peaceful Bay leasehold area is first and foremost a holiday community and that the collective amenity expectations of the holiday leaseholders should take precedence over those of full time occupancy approval holders.*
- ii. Advice to the applicant that full time occupancy recipients have an obligation to make a positive contribution to the Peaceful Bay Community.*
- iii. That Peaceful Bay leasehold area fulltime occupancy approvals are to:*
 - Be limited to a 5 year period and considered on a case by case basis taking into account the suitability of the property for fulltime occupancy and the*

social, environmental and public health factors that will be associated with that approval when considered in context with the other approvals that have already been issued;

- *All have a common expiry date of the 30 June 2017 so that they can be renewed as a block which will allow consideration of their social, environmental and public health impacts on the Peaceful Bay community.*
 - *Be issued to the parties that apply rather than to a premises;*
 - *Be made by the lessee(s) or endorsed in writing by them:*
 - *Be non transferable and expire on the cessation of the lease or the sale of the property and;*
 - *Be able to be renewed for a further term at Council's discretion.*
- iv. *Payment of the scheduled fee that applies from time to time.*

All proposed premises be inspected, prior to approval, to ensure that they are in a fit state of repair and suitable for full time habitation for the number of persons proposed and are fitted with complaint hard wired smoke alarms, dual earth leakage circuit breakers (RCDs) and their septic tanks systems are functional.”

Delegation D100605 – Peaceful Bay Holiday Cottage Full Time Occupancy Approvals was created at the same time and states;

“The Chief Executive Officer is delegated authority to approve full time occupancy on a case by case basis subject to the following conditions being imposed on each approval;

1. *Advice to the applicant that Peaceful Bay leasehold area is first and foremost a holiday community and that the collective amenity expectations of the holiday leaseholders should take precedence over those of full time occupancy approval holders.*
2. *Advice to the applicant that full time occupancy recipients have an obligation to make a positive contribution to the Peaceful Bay Community.*
3. *That Peaceful Bay leasehold area fulltime occupancy approvals are to:*
 - a) *Be limited to a maximum 5 year period (noting the common expiry in part 3b) and considered on a case by case basis taking into account the suitability of the property for fulltime occupancy and the social, environmental and public health factors that will be associated with that approval when considered in context with the other approvals that have already been issued;*
 - b) *All have a common expiry date of the 30 June 2017 so that they can be renewed as a block which will allow consideration of their social, environmental and public health impacts on the Peaceful Bay community.*
 - c) *Be issued to the parties that apply rather than to a premises;*
 - d) *Be made by the lessee(s) or endorsed in writing by them:*
 - e) *Be non transferable and expire on the cessation of the lease or the sale of the property and;*
 - f) *Be able to be renewed for a further term at Council's discretion.*
4. *Payment of the scheduled fee that applies from time to time.”*

New Delegation No. D130201 – Peaceful Bay Holiday Cottage Leases, also states;

“The Chief Executive Officer is delegated authority to approve the assignment and/or mortgage of Peaceful Bay Holiday Cottage Leases.

The delegation is granted on the basis that if the Chief Executive Officer is not prepared to support an assignment the matter is referred to Council for determination.

The application for lease assignment should include a site plan indicating all buildings and the type, size and location of all existing effluent disposal systems.

An inspection will be carried out to confirm the above information and to identify any building maintenance, health, safety or other works required to be addressed prior to or

as part of the assignment and a fee for this service will be charged based on an average assessment and at a fee as per adopted in the Council's annual budget. Officers will endeavour to combine inspections with other routine duties to reduce inspection fees whenever possible.

Any substandard or failing effluent disposal systems must be upgraded to the satisfaction of Council's Environmental Health section and in compliance with State legislation before the lease will be assigned."

Budget / Financial Implications:

In the 2012/13 Budget Council proposes the adoption of a fee for inspection of cottages as a result of a request for permanency and/or transfer or assignment of \$165.00.

The suggestion in the legal advice that Council undertake regular (suggested as annually) inspections of all leasehold property would involve an additional staff resource not currently able to be accommodated without significant additional expense or reallocation of duties. Undertaking 203 inspections per year would involve a minimum of 2 hours per property with contact, inspection, scheduling and adequate documentation.

Based on an hourly rate of say \$45, this would equate to approximately \$18,000 pa.

Given the liability of maintenance rests with the occupier (lessee), combined with the fact that the buildings are almost all single storey, and Council has inspection processes in place for assignments, applications for full-time occupancy and final inspections relating to building permits now, it is the view of the officer that Council cannot afford this task, when assessing the relative risk.

Strategic Implications:

The Peaceful Bay Heritage Precinct Conservation Plan states the entire Peaceful Bay Heritage Precinct is considered to be a zone of considerable significance, with the intention being to protect and enhance the unique special character of the Peaceful Bay original leasehold settlement as a relaxed, informal low key holiday location.

Sustainability Implications:

➤ **Environmental:**

There are no known significant economic considerations relating to the report or officer recommendation.

➤ **Economic:**

The heritage values of the Peaceful Bay Heritage Precinct contribute to the reasons why residents and holiday makers live or visit the seaside community.

➤ **Social:**

The heritage values of the Peaceful Bay Heritage Precinct are recognised by the community of the precinct and by the wider community.

Voting Requirements:

Simple majority.

OFFICER RECOMMENDATION

ITEM 8.5.1

That Council with respect to the leasehold properties at Peaceful Bay;

1. Provide a copy of the legal advice to all leaseholders and the Peaceful Bay Progress Association Inc. for information as to the responsibilities of lessees to ensure that properties are maintained in reasonable condition noting that lessees are liable for any injury or damage caused by any failure of the lessee to maintain the premises in a reasonable and safe condition.
2. Create the following new Council Policy that states that “That as well as considering the intent of the Peaceful Bay Heritage Precinct Conservation Planning Policy, it considers the advice of its solicitors dated 30 May 2012 regarding;
 - Criteria that might guide Council in supporting or refusing applications for demolition of a Peaceful Bay leasehold property; and
 - The requirement to inspect all properties for maintenance in preserving the integrity and safety of the properties prior to consideration of a renewal of lease or request for consideration of full-time occupancy, together with the introduction of an inspection fee”.
3. Advise the Peaceful Bay Progress Association Inc. and lessees that it intends to create a new Council Policy that states that “Prior to obtaining the approval of the owner (the Council as lessor), to proposed significant improvements to a Peaceful Bay Holiday Cottage leasehold property and/or the construction of a new dwelling on that leasehold property, the lessee must provide written confirmation that they agree that the improvements / new building proposed to be the subject of a planning consent application, remains the property of the Shire at the end of the lease.” and seek comment from interested persons to the proposed policy, closing on the 30 September 2012.
4. Council not undertake annual inspections of leasehold properties at this time due to financial constraints and rely on inspection of such properties on assignment or request for consideration of full-time occupancy pursuant to existing Council Policy or when undertaking other required inspections (eg. final inspections in relation to building permits).

Cr Hinds asked whether the Shire President would allow for the points in the Officer’s Recommendation be considered separately. The Shire President agreed.

COUNCIL RESOLUTION

ITEM 8.5.1 a)

MOVED: CR HINDS

SECONDED: CR MORRELL

That Council with respect to the leasehold properties at Peaceful Bay provide a copy of the legal advice to all leaseholders and the Peaceful Bay Progress Association Inc. for information as to the responsibilities of lessees to ensure that properties are maintained in reasonable condition noting that lessees are liable for any injury or damage caused by any failure of the lessee to maintain the premises in a reasonable and safe condition.

CARRIED: 11/0

Res: 040812

COUNCIL RESOLUTION

ITEM 8.5.1 b)

MOVED: CR MORRELL

SECONDED: CR SYME

That Council with respect to the leasehold properties at Peaceful Bay create the following new Council Policy that states that “That as well as considering the intent of the Peaceful Bay Heritage Precinct Conservation Planning Policy, it considers the advice of its solicitors dated 30 May 2012 regarding;

- Criteria that might guide Council in supporting or refusing applications for demolition of a Peaceful Bay leasehold property; and
- The requirement to inspect all properties for maintenance in preserving the integrity and safety of the properties prior to consideration of a renewal of lease or request for consideration of full-time occupancy, together with the introduction of an inspection fee”.

CARRIED: 11/0

Res: 050812

ADJOURNMENT MOTION

MOVED: CR HINDS

SECONDED: CR GILLIES

That part 4 of the Officers Recommendation be deferred to the first meeting of October 2012 to allow for comment to be sought from interested persons prior to the consideration of the adoption of a Policy.

LOST: 2/9

Res: 060812

COUNCIL RESOLUTION

ITEM 8.5.1 c)

MOVED: CR MORRELL

SECONDED: CR SAMPSON

That Council with respect to the leasehold properties at Peaceful Bay advise the Peaceful Bay Progress Association Inc. and lessees that it intends to create a new Council Policy that states that “Prior to obtaining the approval of the owner (the Council as lessor), to proposed significant improvements to a Peaceful Bay Holiday Cottage leasehold property and/or the construction of a new dwelling on that leasehold property, the lessee must provide written confirmation that they agree that the improvements / new building proposed to be the subject of a planning consent application, remains the property of the Shire at the end of the lease.” and seek comment from interested persons to the proposed policy, closing on the 30 September 2012.

CARRIED: 10/1

Res: 070812

COUNCIL RESOLUTION

ITEM 8.5.1 d)

MOVED: CR SAMPSON

SECONDED: CR MORRELL

That Council with respect to the leasehold properties at Peaceful Bay Council not undertake annual inspections of leasehold properties at this time due to financial constraints and rely on inspection of such properties on assignment or request for consideration of full-time occupancy pursuant to existing Council Policy or when undertaking other required inspections (eg. final inspections in relation to building permits).

CARRIED: 11/0

Res: 080812



8.1.5 REQUEST TO DEMOLISH EXISTING DEVELOPMENT AND BUILD NEW 'HOLIDAY COTTAGE' AND OUTBUILDING - SITE 72 THIRD AVENUE, PEACEFUL BAY

File Ref:	A1879
Applicant / Proponent:	Summit North West on behalf of G & G Clark (Lessees)
Subject Land / Locality:	Site 72 Third Avenue, Peaceful Bay
Disclosure of Officer Interest:	Nil
Date:	10 June 2011
Author:	Annette Harbron, Director of Planning and Sustainability
Authorising Officer:	Dale Stewart, Chief Executive Officer
Attachments:	8.1.5 a) – Plans of Existing and Proposed Development 8.1.5 b) – Photos of Existing Development on Site 72 8.1.5 c) – Photos of Redevelopment Works on Site 91

Summary:

The lessees of Site 72 Third Avenue, Peaceful Bay are seeking Council support to the demolition of the existing 'holiday cottage' to facilitate building a new 'holiday cottage' on-site. As per the provisions of the lease and Shire of Denmark's Procedure *OP040239: Construction of New or Significant Alterations to Building Structures on Council Land*, owner approval of the proposed development is required to be obtained prior to formal assessment of a Planning Application.

Having regard to the lease provisions, the Peaceful Bay Heritage Precinct Conservation Plan and Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines it is recommended that Council not support the proposal.

Background:

An application for Planning Approval was lodged with Planning Services in April 2011 for the demolition of the existing 'holiday cottage' (approx. 98m²) and existing shed (9m²) to facilitate building a new 'holiday cottage' (approx. 143m²) and outbuilding/shed (approx. 42m²) – refer Attachment 8.1.5 a).

Upon receipt of the Planning Application, Planning Services advised the applicant (Summit North West) and the lessees (G & G Clark) that the Planning Application was deemed incomplete as the landowner (being the Shire of Denmark) had not signed the application form, and that as per the provisions of the lease pertaining to the site and the Shire of Denmark's Procedure *OP040239: Construction of New or Significant Alterations to Building Structures on Council Land*, owner approval of the proposed development is required to be obtained prior to formal assessment of a Planning Application. After discussions with the Chief Executive Officer and the Director of Finance and Administration it was determined that this proposal was to be referred to Council for their due consideration in its capacity/role as the landowner in the first instance.

Lessee's Request & Justification

The lessee's reasons and justification for the proposal to demolish the existing development on-site and rebuild a new 'holiday cottage' and outbuilding are as follows:

"In June 2009, a builder looked at the existing development on-site with the idea of removing and repairing the white ant damage, roof rust, re-stumping of the house and levelling of the floor area. After the inspection the advice received was that the costs would be too great and it would be less expensive to rebuild completely.

In October 2009 we met with the Shire to discuss the proposal and view what the Council requirements were. After the meeting we determined it would be better to wait until the new lease was signed before doing anything in relation to the building.

A range of options were investigated (i.e. transportable, site kit home etc) such that when the lease was signed we could progress the proposal further.

We have now reached a stage where our family have very young children and they wish to use the house more, but it's current conditions doesn't allow this with the roof leaking, floor, plumbing and electrical evens. Even with a new house we will be limited by the use of rain water.

It is not our intention ever to live there nor any of my immediate family. The new residence is purely designed to be a family holiday house. As for the proposed shed this is to house the boat and 4 wheel drive.

The existing house and the new house are of similar size and we hope to keep in with the surroundings and don't wish to lose the character of the area."

It should be noted that Planning Services have tried to ascertain from the lessees which staff they may have liaised with in October 2009 regarding the proposal as there is no file note of the meeting. To date the lessees have not been able to provide such details other than a passing conversation with the Shire's building staff when they were doing inspections of the area in relation to water supply connection compliance.

Comment:

As referenced above, this proposal is being referred to Council for due consideration in the capacity/role as the landowner in the first instance. Should Council consent to the application as the landowner, the formal planning assessment process can then commence (i.e. full assessment against the relevant Town Planning Scheme and policy provisions that pertain to the proposal, including advertising and internal/external referrals) such that a determination on the planning application can be made (which the applicant will then have appeal rights). Should Council not consent to the application as the landowner, the Planning Application received to date is deemed incomplete and would be returned to the applicant, along with any monies paid associated with the application to date. There are no appeal rights to this process from a planning perspective however there may be the potential for some civil action from a lease perspective.

Lease Considerations

Clause 6.01 of the Lease for the site states

"the Lessee shall not make or cause to be made any structural or other alteration or addition to the Demised Premises without first submitting to the Lessor full detailed drawings and specifications of the proposed works and first obtaining the Lessor's consent in writing".

Given the lessee's justification reasons for seeking demolition of the existing building on-site, Planning & Building Services staff undertook an inspection of the premises - refer Attachment 8.1.5 b). From this inspection it was evident that there were some issues associated with the current development on-site – namely:

- roof leaking which is causing dampness in the building;
- roof is bowing/sagging at the rear of the cottage
- some roof and external timbers are rotting;

- uneven internal floor;
- unevenness with verandah floor including floorboards lifting/moving; and
- the cottage is lined with blue asbestos.

Although it is acknowledged there are some issues with respect to the current state of the dwelling, it is also important to note that it appears there has been very little maintenance work undertaken on the premises by the lessees despite Clause 5.02 of the lease stating:

“At its own expense the Lessee shall at all times during the Term and otherwise for so long as the Lessee remains in occupation of the Demised Premises maintain the Demised Premises and all improvements placed thereon by the Lessee in good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the lessor (damage by fire, storm, tempest, earthquake and explosion excepted).”

Heritage Values Considerations

The Peaceful Bay Heritage Precinct pertains to the original leasehold subdivision of the settlement in Peaceful Bay – comprised of 163 houses constructed along First, Second, Third and Fourth Avenues. The Peaceful Bay Heritage Precinct is classified in Town Planning Scheme No. 3 (TPS No. 3) as a “Place of Heritage Value”. Strategic and policy documents that relate to the Peaceful Bay Heritage Precinct are the:

- Peaceful Bay Heritage Precinct Conservation Plan (PBHPCP); and
- Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines (Policy 35).

Site 72 Third Avenue is located within the Peaceful Bay Heritage Precinct, thus the following provisions are relevant for consideration of this proposal:

- The PBHPCP states that within a state context the entire Peaceful Bay Heritage Precinct is considered to be a zone of considerable significance. This category warrants inclusion on any register of heritage places with conservation highly recommended. As a result, the Peaceful Bay Heritage Precinct has been the subject of the Heritage Council of Western Australia’s consideration for State listing since 2004.
- The Peaceful Bay Heritage Precinct is listed in the 1999 Municipal Heritage Inventory (MHI) as Category ‘C’ – that is:
 - Retain and conserve if possible.
 - Endeavour to conserve the significance of the place through the provisions of the Town Planning Scheme.
 - A more detailed Heritage Assessment/Impact Statement to be undertaken before approval given for any major redevelopment.
 - Incentives to promote conservation should be considered.
- In the draft 2011 MHI, the Peaceful Bay Heritage Precinct level of significance has been recommended as ‘Exceptional’ – that is:
 - Essential to the heritage of the locality.
 - Rare or outstanding example.
 - The place should be retained and conserved unless there is not feasible and prudent alternative to doing otherwise.
 - Any alterations or extensions should reinforce the significance of the place, and be in accordance with a Conservation Plan.
- Clause 4.5.1 of Policy 35 states “Most of the houses have been classified in the PBHPCP as having some cultural heritage significance, apart from No. 79, which is constructed of brick. There should be no demolition or removal of any of the original sections of buildings that are classified as having some cultural heritage significance”.

- Clause 4.5.2 of Policy 35 states “The buildings which are classified as having considerable or some heritage value should be conserved and maintained”.
- From a review of records, there have been numerous proposals supported for redevelopment of ‘holiday cottages’ ranging from small minor additions through to major renovations (refer Attachment 8.1.5 c)), however there is no record of the complete demolition of ‘holiday cottages’ in the Peaceful Bay Heritage Precinct area.

Conclusion

At this stage Council is being asked to consider the proposal in its capacity/role as the landowner in order to facilitate the formal lodgement of a Planning Application. In determining a position in relation to this proposal, the following issues all need to be put into context:

- Not undertaking maintenance could be deemed a breach of the lease provisions, thus Council needs to consider at what point it is prepared to accept complete demolition as being an appropriate option as opposed to maintenance, repair and redevelopment proposals;
- Are cost factors associated with maintenance and repair a justifiable reason to support demolition as opposed to maintenance, repair and redevelopment proposals?;
- The precedence that may result and the associated impacts on the heritage values of Peaceful Bay, noting however that there is the potential to address heritage values through good building design;
- Did the Shire have a role to play to ensure that conditions of leases were being met prior to entering into new leases, particularly in the case of leases being re-entered into with former lessees?;
- Should the Shire have had a role to play from a maintenance inspection regime perspective such that holiday cottages were not run-down to the extent that demolition was considered the only option from the lessee’s perspective; and
- The strategic value and importance of the Peaceful Bay Heritage Precinct Conservation Plan and Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines.

Having regard to the above, it is recommended that Council not support the proposal to demolish the existing ‘holiday cottage’ to facilitate building a new ‘holiday cottage’.

Consultation:

External Consultation

Informal consultation on the subject request was held with the Peaceful Bay Progress Association (via the Director of Community & Regulatory Services discussing the request at the Association’s meeting held on 13 June 2011) and from this consultation the Association did not express any fundamental objection to the demolition component of the proposal.

Internal Consultation

- Chief Executive Officer
- Director of Finance and Administration
- Building Services

Statutory Obligations:

The lease between the Shire of Denmark and G & G Clark commenced on 1 July 2010 for a period of 21 years. The lease clearly sets out the requirements of the lessor (the Shire of Denmark) and the lessee (G & G Clark) with respects to issues such as:

- Use of demised premises;
- Inspection, maintenance and repair of demised premises;
- Rental and other lessee charges and
- Alterations to demised premises.

Council is considering this application in its capacity/role as the landowner initially as this will determine whether the Planning Application process can commence.

Should Council consent to the proposal as the landowner, it should be noted that Council as the decision making authority could still refuse the Planning Application, noting however that the applicant then has appeal rights as per the provisions of the *Planning and Development Act 2005*.

Policy Implications:

Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines applies to the development proposal for Site 72 Third Avenue. A Town Planning Scheme Policy does not bind the Council in respect of any application, but the Council shall take into account the provisions of the policy and the objectives which the policy was designed to achieve before making its decision.

Should Council resolve to consent to the lodgement of the Planning Application as the landowner, a formal assessment of the proposal having regard to the relevant provisions of TPS No. 3 and Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines will need to be undertaken, including public advertising as per Clause 7.3 of TPS No. 3.

To date Planning Services have only undertaken a preliminary assessment of the plans having regard to Policy No. 35 and have identified the following issues that need further consideration:

- The use of custom orb cladding and aluminium windowframes as opposed to the preference for weatherboard (jarrah or similar) and timber window frames
- The dwelling does not have a good streetscape aspect with no front verandah or front door elements facing the street;
- The alfresco area to the side of the dwelling is not consistent with roof forms or streetscape in the area
- The proposal for a paved driveway and grass crossover is generally not supported; and
- The proposal entails removal of some mature peppermints which is generally not supported.

Budget / Financial Implications:

There are no known financial implications upon the Council's current Budget or Plan for the Future.

Should Council not consent to the Planning Application as the landowner, reimbursement of the Planning Application and Building Licence fees paid (being \$1536.50, noting this includes the BCITF and BRB fees) will need to be organised.

Strategic Implications:

The Peaceful Bay Heritage Precinct Conservation Plan states the entire Peaceful Bay Heritage Precinct is considered to be a zone of considerable significance, with the intention being to protect and enhance the unique special character of the Peaceful Bay original leasehold settlement as a relaxed, informal low key holiday location.

Sustainability Implications:➤ **Environmental:**

There are no known significant economic considerations relating to the report or officer recommendation.

➤ **Economic:**

The applicant has indicated that the costs associated with maintenance and repair works on the existing 'holiday cottage' exceed the costs associated with demolishing and building a new 'holiday cottage'. This however should not be the sole reason for Council supporting the request to demolish the existing 'holiday cottage'.

➤ **Social:**

The heritage values of the Peaceful Bay Heritage Precinct are recognised by the community of the precinct and by the wider community.

Voting Requirements:

Simple majority.

OFFICER RECOMMENDATION

ITEM 8.1.5 a)

That Council with respect to the proposal for demolition of the existing 'holiday cottage' to facilitate building a new 'holiday cottage' on Site 72 Third Avenue, Peaceful Bay advise the applicant/lessees that:

1. Consent to the proposal, as required under Clause 6.01 of the lease between the Shire of Denmark and G & G Clark, is not granted on the basis that the demolition of 'holiday cottages' is not supported by the Peaceful Bay Heritage Precinct Conservation Plan and Town Planning Scheme No. 35 – Peaceful Bay Conservation Plan Development Guidelines;
2. Consent to the proposal by Council as the landowner, as required for the Application for Planning Consent, is not granted; and
3. Redevelopment of the existing 'holiday cottage' is supported, along with major additions/renovations, subject to due regard being given to Town Planning Scheme No. 35 – Peaceful Bay Conservation Plan Development Guidelines, thus consultation should occur with Planning Services staff to progress a proposal that will be supported.

COUNCIL RESOLUTION & CR LAING'S RECOMMENDATION

ITEM 8.1.5 a)

MOVED: CR LAING

SECONDED: CR PHAIR

That Council advise the lessee of site 72 Third Avenue Peaceful Bay that it is prepared to consider providing approval as the lessor/landowner in accordance with Clause 6.01 of the lease such that an Application for Planning Approval for demolition of the existing 'holiday cottage' to facilitate building a new 'holiday cottage' subject to the following provisions;

1. That the applicant demonstrate to Council's satisfaction that the building is in such a state that it is beyond its useful life and generally unfit for habitation and/or economical repair and;
2. That the applicant demonstrate to Council's satisfaction concept building plans and elevations of the proposed replacement building that are sympathetic to and conform to the principles of the Peaceful Bay Heritage Precinct Conservation Plan and Town Planning Scheme Policy No. 35 - Peaceful Bay Conservation Plan Development Guidelines (noting that the current submitted plans in the opinion of Council do not).

CARRIED: 11/0

Res: 120611

REASONS FOR CHANGE

The building is possibly beyond repair and Council was prepared to allow the applicant to demonstrate it to Council.

COUNCIL RESOLUTION & OFFICER RECOMMENDATION ITEM 8.1.5 b)

MOVED: CR LAING

SECONDED: CR SAMPSON

That with respect to the Peaceful Bay Leasehold Cottages, Council request the Chief Executive Officer to have prepared a report on the potential for conflicts or policy direction relating to the lease obligations of the lessor and / or lessee with respect to maintenance, criteria for supporting demolition, removal of improvements at the end of term (of the lease) and the Council's existing inspection regime, Peaceful Bay Conservation Plan and Town Planning Scheme Policy No. 35.

CARRIED: 11/0

Res: 130611



953 South Coast Highway, Denmark Western Australia 6333

Tel (08) 9848 0300 Fax (08) 9848 1985

Our Ref: DS/CT File A3104

Enquiries: Dale Stewart

7 July 2011

Mr D Mcleod
McLeods Barristers & Solicitors
220-222 Stirling Hwy
CLAREMONT WA 6010
Emailed to: imcleod@mcleods.com.au

Dear Dennis

Re: Peaceful Bay Leaseholds

I write to seek legal advice on a matter relating to the leaseholds cottages at Peaceful Bay, comprising some 203 private holiday cottages situated on a Council Reserve No. 24510 which is managed by Council through a Management Order with the power to lease.

The cottages all have the same lease (blank example copy enclosed) and all have the same expiration date (30 June 2031) (renewed in 2010).

Recently Council was faced with the request of assessing an application for demolition of one of the cottages (refer attached report) which tested the first question of 'lessor' approval (pursuant to clause 6.01 of the lease) as well as that as the 'owner' (pursuant to clause c of the Council's Town Planning Scheme (TPS) No. 3) prior to either the Council (or its staff under delegation) considering the question of considering the development application for demolition as the planning authority.

The first question is to confirm that prior to assessing an application for development pursuant to our TPS is that the lease requires the lesser to seek approval of the Council (lessor) and that thereafter that the approval of the Council is not required as 'the owner' as would be normal, as our Scheme defers that right to the lessee (I think in error and contrary to the model scheme text) (refer clause 'c' of the definition of 'owner' under our scheme as it refers to the lessee (not lessor).

The second question that I seek clarity from McLeod's on is the legal ability of Council to deny approval as the 'owner' and or 'lessor / management authority' if a different answer to this (Scheme versus Lease), and what rights of appeal, compensation, breach of contract or other action is open to the applicant (lessee) which may exist if that was the case. The issue, in simple terms, is that the Conservation Plan and Town Planning Policy have a presumption that all of

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Celebrating 100 years of Local Government in 2011

All communications to:
Chief Executive Officer, PO Box 183, Denmark WA 6333
Email: enquiries@denmark.wa.gov.au
Website: www.denmark.wa.gov.au

Attachment 8.5.1 b)

the cottages covered by the Policy and Plan, have heritage value and there is a presumption against demolition. Council is grappling with the issue of whether it should have a more thorough maintenance / inspection regime either annually, on assignment or sale or so often as lessor (and or as the local building and health authority) so as to identify maintenance or public health issues when they might first become evident, or whether this liability solely / mostly rests with the lessee and or buyer (assignee). In other words, if Council does nothing as the local authority and or the lessor to inspect or enforce maintenance / health requirements and then some years later refuses permission to demolish on the basis that the lessee(s) over the years (either of themselves and or through assignment) should have 'maintained' it, what would be the expectations at law and or appeal...?

The following issue (question) is that of our obligations pursuant to the lease and or the laws of tort and precedents such as the 'Pyrenees' case etc, in relation to potential for conflicts or policy direction relating to the lease obligations of the lessor and / or lessee with respect to maintenance. At present, Council's administrative practice is that the building is inspected prior to sale (assignment) by a qualified Health Inspector, typically with Building Surveyor qualifications (but not always) so as to identify any building maintenance, health, safety or other works required to be addressed prior to or as part of the assignment and a fee for this service is charged based on an average assessment. Smoke alarms, RCDs, general health issues, compliance with potable water signage, etc are examples of things that are brought to the attention of the vendor and purchaser and their agents. If however the property is not assigned for some extended period – let's say 21 years (and we didn't inspect them on re-signing them for another 21 years in 2010) then it is possible that we have not had cause to enter the property to inspect and or our current regime is such that we don't inspect the properties from time to time (say once a year) like a landlord would, notwithstanding that our lease gives us the right to.

Does this lessen our defense, in supporting the view that they should have 'maintained' it such that it didn't get to a state of disrepair thus necessitating the application for demolition, and or make us liable in any way in the event of personal injury or accident?

For information the Council's existing delegation that relates states "The Chief Executive Officer is delegated authority to approve the assignment and/or mortgage of Peaceful Bay Holiday Cottage Leases. The delegation is granted on the basis that if the Chief Executive Officer is not prepared to support an assignment the matter is referred to Council for determination. The application for lease assignment should include a site plan indicating all buildings and the type, size and location of all existing effluent disposal systems. An inspection will be carried out to confirm the above information and a fee will be charged. Officers will endeavour to combine inspections with other routine duties to reduce inspection fees whenever possible. Any substandard or failing effluent disposal systems must be upgraded to the satisfaction of Council's Environmental Health section and in compliance with State legislation before the lease will be assigned."

This delegation will be modified to correctly reflect the above inspection regime (beyond the limitations of the existing delegation) in coming months, together with any additional advice that you would provide about guiding officers and Council so as to ensure that its risks are managed whilst still complying with its obligations pursuant to the lease and at law.

The next issue for clarity from McLeod's is the issue of determination of the property on yielding up or end of term of the lease. Clauses that relate (perhaps amongst others) include;

5.02 Maintenance of Demised Premises

At its own expense the Lessee shall at all times during the Term and otherwise for so

long as the Lessee remains in occupation of the Demised Premises maintain the Demised Premises and all improvements placed thereon by the Lessee in good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor (damage by fire storm tempest earthquake and explosion excepted).

14.02 Lessee's Obligation to Remove Fittings

The Lessee shall within FOURTEEN (14) days after the expiration of the Term or immediately prior thereto remove from the Demised Premises all the Lessee's fixtures and fittings and improvements which are erected or installed on the Demised Premises unless consent for such fixture fittings or improvements to remain on the Demised Premises is obtained from the Lessor and the Lessee shall make good to the satisfaction of the Lessor all damage caused to the Demised Premises by the removal.

The question here is does the lease give the absolute right of the lessee to remove the buildings (the cottage - being the improvements) at the end of term as the 'owner' of the improvements? If the answer is yes – then does it call into question the intent of the Conservation Plan and Town Planning Policy that purports to ensure the continuity of the Peaceful Bay Conservation Heritage Precinct that has a presumption against demolition in favour of preservation and is there the potential for conflict between the intents of these two 'planning documents' and the rights of the lessee to remove the improvements? Or do they work together in that the planning authority might well refuse the applicants request to remove the property, which is open to appeal, and if upheld, does this then potentially give right to some form of compensation from the lessor or some obligation to purchase the improvements under or civil, contract or other law?

Last but not least, any guiding premises at law in relation to the above to guide Council in determining criteria to deny or support an application for demolition (valuing the heritage as contrasted to the costs of repairs) (how far gone is the building to be salvaged and repaired and whose fault was it – the Council as lessor (for allowing it) or the lessees?) that would generally stand up on appeal.

By way of additional background, Council resolved as follows; "That with respect to the Peaceful Bay Leasehold Cottages, Council request the Chief Executive Officer to have prepared a report on the potential for conflicts or policy direction relating to the lease obligations of the lessor and / or lessee with respect to maintenance, criteria for supporting demolition, removal of improvements at the end of term (of the lease) and the Council's existing inspection regime, Peaceful Bay Conservation Plan and Town Planning Scheme Policy No. 35".

Should you require further information or advice on this matter please contact the undersigned on telephone (08) 9848 0300 or email enquiries@denmark.wa.gov.au.

Yours faithfully



*Dale Stewart
Chief Executive Officer*

Enc. Blank Leasehold Lease; Council Officer Report and Resolution of 28 June 2011; Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines; and Purchase Order No. 1300

cc Directors of Community & Regulatory Services, Finance & Administration & Planning & Sustainability

Shire of Denmark

(“Lessor”)

and

«Owner_1»

«Owner_2»

«Owner_3»

«Owner_4»

«Owner_5»

«Owner_6»

«Owner_7»

(“Lessee”)

LEASE

Peaceful Bay Reserve 24510 Site No. «Lot_No»
on
Land Administration Statutory Services Plan 20017

Attachment 8.5.1 c)

WESTERN AUSTRALIA
 LAND ADMINISTRATION ACT 1997
 TRANSFER OF LAND ACT 1893 as amended

LEASE OF CROWN LAND (L)

DESCRIPTION OF LAND (NOTE 1)

DESCRIPTION OF LAND (NOTE 1)	EXTENT	VOLUME	FOLIO
Portion of Hay Locations 1423, 1424 and 2229 and being site «Lot_No» on Land Administration Statutory Services Plan 20017, subsidiary title volume «Volume» folio «Folio».	Whole	3122	555

ENCUMBRANCES (NOTE 2)

Nil

LESSOR/LESSORS (NOTE 3)

Shire of Denmark of PO Box 183 Denmark WA 6333
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LESSEE/LESSEES (NOTE 4)

«Owner_1»	«Owner_5»
«Owner_2»	«Owner_6»
«Owner_3»	«Owner_7»
«Owner_4»	

TERM OF LEASE (NOTE 5)

21 Years	Months	Days
Commencing from the	First day of	July in the year 2010

THE LESSOR HEREBY LEASES TO THE LESSEE the land above described subject to the encumbrances as shown hereon (Note 6)
For the above term for the clear yearly rental of (Note 7) One Thousand and One Hundred Dollars (\$1,100.00) payable (Note 8) annually in advance

SUBJECT TO THE COVENANTS AND POWERS IMPLIED UNDER THE LAND ADMINISTRATION ACT 1997 AND THE TRANSFER OF LAND ACT 1893 AS AMENDED (UNLESS HEREBY NEGATED OR MODIFIED) AND ALSO TO THE COVENANTS AND CONDITIONS CONTAINED HEREIN.

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THE SCHEDULE

THIS DEED is made on the first day of July 2010.

BETWEEN:

SHIRE OF DENMARK of PO Box 183, Denmark, Western Australia ("the Lessor") of the first part

AND

The party named and described in the Schedule as lessee ("the Lessee")

WHEREAS:

- A. The Land comprises a Class A Reserve No 24510 and is situated at Peaceful Bay Western Australia and is managed by the Lessor through a management order for the purpose of Recreation, Camping, Caravan Park and Holiday Cottages and empowers the Lessor to lease the whole or any portion of the part thereof as is comprised in Hay Locations 1423, 1424 and 2229 subject to the prior approval in writing of the Minister for Lands.
- B. Subject to the consent of the Minister for Lands being obtained hereto the Lessor has agreed to grant to the Lessee a lease of the Demised Premises upon the terms and conditions hereinafter contained.

NOW THIS DEED WITNESSES as follows:-

Subject to the provisions of clause 17 hereof the Lessor HEREBY LEASES to the Lessee and the Lessee HEREBY TAKES ON LEASE the premises ("Demised Premises") described in Item 1 of the Schedule TO BE HELD by the Lessee for the term commencing on the date specified in Item 2 of the Schedule ("Date of Commencement") and terminating on the date or at the time specified in Item 3 of the Schedule ("Termination Date") (that period described herein as "the Term" which expression when not repugnant to the context includes any term determined before the date specified in Item 3 of the Schedule) at the rental calculated and payable as hereinafter provided and subject to the following terms covenants and conditions AND the Lessor and the Lessee HEREBY COVENANT AGREE AND DECLARE that throughout the Term (regardless of the date of this Deed or the date of execution of it by any party hereto) and any renewal or extension thereof:-

1. DEFINITIONS AND INTERPRETATION

1.01 Joint and Several Liability

Where two or more persons are the Lessee the covenants and obligations on their part herein contained bind them jointly and each of them severally.

1.02 Land

The term "Land" means Class A Reserve No 24510 comprising Lot 1424 on Deposited Plan 202471 and Lots 1423 and 2229 on Deposited Plan 240012 being the whole of the land comprised in Qualified certificate of Crown land title Volume 3122 Folio 555.

- 1.03 Lessee
The term "Lessee" means the Lessee above described and where the context permits includes in the case of a body corporate its successors in title and permitted assigns and in the case of a natural person his executors administrators and permitted assigns.
- 1.04 Lessee's Covenants
The term "Lessee's Covenants" means the covenants and agreements contained or implied in this Lease to be observed and performed by the Lessee.
- 1.05 Rental Year
The term "Rental Year" means each period of TWELVE (12) months during the Term and includes the period commencing on the Date of Commencement to the following 30th June and also includes any period of less than twelve (12) months from the 1st July immediately prior to the Termination Date to that date.
- 1.06 Yearly Rental
The term "Yearly Rental" means the annual sum set forth in Item 4 of the Schedule as reviewed from time to time as hereinafter provided for.
- 1.07 Improvements
The term "Improvements" means any structure, building or other fixture or fitting in or upon the Demised Premises.
- 1.08 Captions and Headings
Captions and headings used herein are for convenience and reference only and shall not have any effect on the interpretation construction or effect hereof.
- 1.09 Holiday Cottage
The term "Holiday Cottage" means any building for short term accommodation of people approved by the Lessor from time to time.
- 1.10 Minister for Lands means a body corporate under section 7 of the Land Administration Act 1997.
2. RENTAL
- 2.01 Manner of Payment of Yearly Rental
The Lessee shall pay the Yearly Rental for each Rental Year during the Term in the manner described in Item 4 of the Schedule without any deduction or set off and without any demand therefor being made by the Lessor PROVIDED THAT the Lessor may from time to time with effect from the 1st July in any year during the Term ("Rent Review Date") review the Yearly Rental and the Lessee shall pay the Yearly Rental as reviewed from the relevant Rent Review Date.
- 2.02 Rent Review
(a) The Yearly Rental payable in the first year of the Lease Term will be the Yearly Rental as determined by the Valuer General who shall also provide Yearly Rentals effective for the years commencing 1 July 2015, 1 July 2020, 1 July 2025 and 1 July 2030. The rent payable from the Review Date other than those Rent Review Dates mentioned in this clause, will be the rent payable by the Lessee immediately preceding the relevant Review Date increased by the sum ascertained by multiplying the rental payable immediately prior to the Review Date by the most recently published Consumer Price Index number applicable at that Review date and dividing the resulting figure by the most recently published Consumer Price Index number applicable at the next preceding Review Date or in the case of the first review the

Commencement Date PROVIDED THAT the rental payable will not be less than the rental payable immediately prior to the relevant Review Date.

If the Consumer Price Index at any relevant date is no longer published by the Australian Bureau of Statistics the Lessor will substitute a figure which the Lessor will reasonably determine and in determining the Lessor will use an index which is as near to the Consumer Price Index as is reasonably possible.

“Consumer Price Index” means the Consumer Price Index (All Groups) for Perth as presently calculated by the Australian Bureau of Statistics.

(b) The Lessor shall not by reason of its failure to give the Lessor’s Notice within the time referred to in Clause 2.02(a) forfeit its right to have the annual rent reviewed and if the Lessor gives the Lessee notice in writing later than the time referred to in Clause 2.02(a) then the Lessor’s Notice whenever given shall be of the same force and effect as if it were given as specified in Clause 2.02(a) and the rate at which the annual rent is payable shall be payable from the date of the notice if the notice is sent after the period of three (3) months from the Rent Review Date.

2.03 G.S.T.

(a) Whenever any payment is required to be made by the Lessee in accordance with the terms of this Lease, whether to the Lessor or otherwise, the Lessee shall also pay to the Lessor or as directed by the Lessor, any and all taxes, levies, impositions or charges required to be paid in addition to or in respect or as a consequence of that payment including, but not limited to, the amount of all or any tax in the nature of a goods and/or services tax or consumption tax or value added tax or other like tax and a failure to pay the same shall be a breach by the Lessee of this Lease.

(b) The Lessee shall pay the tax, levy, imposition or charge referred to in paragraph (a) hereof at the same time and in the same manner as the payment to which it relates unless otherwise directed by the Lessor.

(c) A certificate given to the Lessee by the Lessor of the amount of the tax, levy, imposition or charge referred to in paragraph (a) hereof will be conclusive as between the Lessee and the Lessor except in the case of manifest error.

3. OTHER LESSEE CHARGES

3.01 Utility Charges

Unless otherwise expressly provided herein the Lessee shall pay all charges connection fees disconnection fees rental maintenance service and other like costs payable in respect of water, electricity, gas, telephone and all other services provided to, servicing or charged to the Demised Premises as well as all municipal rates from time to time levied or raised by the Lessor against the Demised Premises. The Lessee shall also pay to the Lessor upon demand or otherwise as specified from time to time by the Lessor such fees as the Lessor may from time to time charge or levy in respect of the Demised Premises toward the costs associated with the provision of future infrastructure and/or infrastructure services to Peaceful Bay. In the event of a dispute between the parties as to the amount of any such fee, charge or levy the certificate of the Lessor shall be conclusive proof.

3.02 Costs of Lease

Upon demand by the Lessor the Lessee shall pay the sum of \$100 for the cost of Lease preparation plus any legal costs charges fees necessary for the registration and stamping of the Lease as well as all expenses incurred by the Lessor in relation to a determination of the Term

or any attempt thereat a re-entry by the Lessor into the Demised Premises or any attempt thereat a surrender of this lease (including any stamp duties thereon) and the granting of any consent by the Lessor.

3.03 Interest On Overdue Money

Without affecting the rights, powers and remedies of the Lessor under this Lease the Lessee shall pay to the Lessor on demand interest on any money due by the Lessee to the Lessor pursuant to this Lease but unpaid for SEVEN (7) days computed from the due date for payment until payment in full which interest is recoverable in the like manner as Yearly Rental in arrears and which interest is to be computed at the rate per cent per annum determined in accordance with Section 6.51 of the Local Government Act 1995 (as amended). The certificate of the Lessor shall be conclusive proof of such rate.

4. USE OF DEMISED PREMISES

4.01 Permitted Use

The Lessee may use the Demised Premises for the purpose or purposes specified in Item 5 of the Schedule but not for any other use or purpose without the prior written consent of the Lessor.

4.02 Statutes, Regulations, Policies, and Local Laws

The Lessee shall at its own expense observe perform and fulfil the requirements of all statutes as well as all regulations, by-laws, ordinances, local laws and policies of the Lessor relating to the Land and the Demised Premises and or the use to which the same are being put and ensure that all of the Lessee's guests also observe those statutory regulations ordinances and local laws.

4.03 Annoying or Injurious Conduct

The Lessee shall not carry on or permit to be carried on in any part of the Demised Premises any business or any noxious offensive or illegal activity or practice nor do or permit to be done therein any act or thing or use or permit to be used any plant or machinery which through noise odour vibration or otherwise is or may grow to be an annoyance nuisance grievance or disturbance or be damaging to any person including but not limited to any other tenant of the Land or to the Lessor or to the occupiers of land adjoining the Land. The Lessee shall not nor shall it permit any of its invitees or licensees to obstruct any part of any areas set aside by the Lessor as thoroughfares for vehicles or persons.

4.04 Cleaning of Demised Premises

The Lessee shall keep the Demised Premises clean and not allow any accumulation of useless property or rubbish therein or thereon and at its own expense the Lessee shall clean and keep clean the Demised Premises to the reasonable satisfaction of the Lessor.

4.05 Location of Refuse

The Lessee shall not permit any garbage refuse rubbish container or other waste material to accumulate in or outside around or in the vicinity of the Demised Premises except where designated by the Lessor for that purpose.

4.06 Amplified Noise

The Lessee shall not without the prior written consent of the Lessor play broadcast or amplify any musical instrument radio broadcast or other music or announcement so as to be audible by or annoying or a nuisance to other persons lawfully on or about the Land or to occupiers of land adjoining the Demised Premises.

4.07 Weed and Pest Control

The Lessee shall use its best endeavours to keep the Demised Premises free from infestation by rodents weeds and other pests.

4.08 Excavation and Erosion

The Lessee shall not excavate, mine, dig up or remove any gravel, soil, sand, stone, mineral or other substance from the Demised Premises or the Land nor disturb the surface of the soil in a manner likely to cause erosion.

4.09 Trees and Shrubs

The Lessee shall not destroy fell cut down any trees or shrubs on the Land or on the Demised Premises except such as shall be absolutely necessary to provide for the erection construction and maintenance of such cottage and other improvements on the Demised Premises of which the Lessor has approved.

4.10 Lessee's Environmental Obligations

The Lessee:

- (a) must not cause or permit any contamination within the meaning of the Contaminated Sites Act 2003, to the Demised Premises or the surrounding area;
- (b) must notify the Lessor immediately on becoming aware of:
 - (i) the existence of any contamination affecting the Demised Premises or the surrounding area;
 - (ii) a notice under the Contaminated Site Act 2003 being served on the Lessee or any other person which relates to or arises from the Lessee's use of the Demised Premises;
- (c) must at the Lessee's costs comply with every notice issued under the Contaminated Sites Act 2003 in respect of or arising from or relating to the Lessee's use of the Demised Premises;
- (d) Without affecting:
 - (i) the obligations of the Lessee in this clause; or
 - (ii) limiting any right or, or indemnity in favour of, the Lessor or the Minister for Lands,if any contamination occurs in breach of subclause (a) the Lessee must do everything necessary to minimise the effect of the contamination as soon as reasonably practicable and must remediate any result in damage or harm, to the reasonable satisfaction of the Lessor and in compliance with the Contaminated Sites Act 2003.

5. INSPECTION, MAINTENANCE AND REPAIR OF DEMISED PREMISES

5.01 Inspection by Lessor

The Lessor or its duly authorised agents may with or without workmen and others at all reasonable times enter upon and view the state of repair of the Demised Premises.

5.02 Maintenance of Demised Premises

At its own expense the Lessee shall at all times during the Term and otherwise for so long as the Lessee remains in occupation of the Demised Premises maintain the Demised Premises and all improvements placed thereon by the Lessee in good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor (damage by fire storm tempest earthquake and explosion excepted).

5.03 Rainwater Tank

At its own expense the Lessee shall maintain a storage tank for the retention of at least 4,640 litres of rainwater and will not construct any replacement rainwater tank on the Demised Premises of a capacity less than 4,640 litres.

This clause will be waived and have no effect where the Demised Premises is connected to an approved reticulated potable water supply.

6. ALTERATIONS TO DEMISED PREMISES

6.01 No Alteration without Consent

The Lessee shall not make or cause to be made any structural or other alteration or addition to the Demised Premises without first submitting to the Lessor full detailed drawings and specifications of the proposed works and first obtaining the Lessor's consent in writing.

7. DAMAGE OR DESTRUCTION

7.01 Termination of Lease Term

If the Demised Premises are totally or partially destroyed or damaged by fire flood storm earthquake tempest explosion riot civil commotion war or otherwise by inevitable accident or act of God and without any neglect or default on the part of the Lessee and thereby rendered wholly or partly unfit for occupation or use by the Lessee the Lessor may elect to determine the Term (but without prejudice to any right which accrues prior to such determination).

In exercising its discretion under this clause the Lessor shall not determine the Term if, within 90 days of the event, the Lessee makes a written request for consent to repair or rebuild the improvements on the Demised Premises at the Lessee's cost and to the Lessor's usual requirements (**Request**) and it undertakes such works promptly, but if the Lessor notifies the Lessee within 90 days of receipt of the Request that it intends to put the Demised Premises to an alternative use then the Lessor may thereupon determine the Term.

8. RESERVATIONS

8.01 Right of Entry to Effect Works

The Lessor reserves the right with contractors' workmen and others and with all necessary materials machinery and appliances to enter upon the Demised Premises at all reasonable times for the following purposes:-

- (a) erecting laying or installing in under or over the Demised Premises any pole mast post drain conduit pipe main cable electric or other wire; or
- (b) inspecting removing installing maintaining altering or adding to services to the Land;

PROVIDED ALWAYS that in the exercise of these rights the Lessor shall use its reasonable endeavours not to cause any undue inconvenience to the Lessee.

9. INDEMNITIES

9.01 Indemnities for Lessor

The Lessee shall indemnify and shall hold indemnified the Minister for Lands and Lessor from and against all actions claims demands losses costs and expenses which the Minister for Lands or Lessor sustains or incurs or for which the Minister for Lands or Lessor becomes liable whether during or after the Term in respect of or arising from:-

- (a) Breach of Covenant
Loss damage or injury from any cause to property or person upon the Demised Premises occasioned or contributed to by the neglect or default of the Lessee or its servants agents sub-tenants or other persons claiming through or under the Lessee to observe or perform any covenant condition regulation or restriction on the part of the Lessee hereunder whether positive or negative expressed or implied.
- (b) Misuse
The negligent or wilful misuse waste or abuse by the Lessee or its servants agents or other persons claiming through or under the Lessee of any water gas electricity or other services to the Demised Premises.
- (c) Escape of Harmful Agent
The overflow leakage or escape of water fire gas electricity, any other harmful agent or contamination within the meaning of that term under the Contaminated Sites Act 2003 in or from the Demised Premises caused by or contributed to by any act or omission on the part of the Lessee or its servant's agents or any other person in the Demised Premises with the express or implied consent of the Lessee.
- (d) Failure to Notify
The failure of the Lessee to notify the Lessor of any known danger in or about the Demised Premises.
- (e) Use of Demised Premises
Loss (including loss of life) damage or injury from any cause to property or person caused or contributed to by the use of Demised Premises by the Lessee or its servant's agents or any other persons in the Demised Premises.
- (f) Personal Injuries
Loss damage or injury sustained by the Lessee or any servant workman employee client customer visitor invitee or licensee of the Lessee or any member of the public in upon or about the Demised Premises.

10. INSURANCE

10.1 Lessee's Insurance

At its own expense the Lessee shall effect and maintain the insurance specified in Item 6 of the Schedule with reputable insurers and shall produce to the Lessor upon demand such proof of the extent and currency of the policy of insurance as the Lessor requests.

11. ASSIGNMENT SUBLETTING AND MORTGAGES

11.01 Restriction on Assignment

Subject to clause 11.02 hereof the Lessee shall not assign, sublet, mortgage, charge, part with possession of, nor dispose of, the Demised Premises or any part thereof or the benefit of this Lease without the prior written consent of the Lessor and the Minister for Lands which consents may be given or withheld as the Lessor or the Minister thinks fit, and if given may be given conditionally PROVIDED THAT the lessor will not unreasonably withhold its consent to such assignment.

Where consent is given it shall be subject to the Assignee executing and delivering to the Lessor a Deed of Assignment which shall be at the cost of the Assignee or Lessee as they determine.

11.02 Property Law Act

It is agreed and declared that Sections 80 and 82 of the Property Law Act 1969 are hereby expressly excluded.

12. LESSOR'S WARRANTIES AND EXCLUSION OF IMPLIED WARRANTIES

12.01 Quiet Enjoyment

The Lessor covenants with the Lessee that if the Lessee pays the Yearly Rental in accordance with this Lease and observes and performs the terms covenants and conditions on its part herein contained the Lessor will allow the Lessee to peaceably hold and enjoy the Demised Premises during the Term without interruption by the Lessor.

12.02 Assumption of Risk by the Lessee

The Lessee agrees to occupy and use the Demised Premises at the risk of the Lessee and the Lessor will not in any circumstance be liable to the Lessee for, and hereby releases and forever discharges the Lessor from, all claims, demands, actions, proceedings and liability in respect of any damage to the improvements, chattels or property of the Lessee contained in or about the Demised Premises occasioned by erosion, storm, surge, damage, flooding, subsidence or other act of God, water, heat, fire, electricity, vermin, explosion, bursting pipes or by the entry of water from any source whatsoever.

12.03 Warranties Negatived

The Lessee acknowledges that this Lease has been entered into on the basis that it is of the vacant premises only and the Lessor makes no representation nor gives any warranty that all of the improvements on the Demised Premises are located within the boundaries of the Demised Premises. The Lessor hereby expressly negates and excludes all such representations and warranties.

13. DEFAULT OF LESSEE

13.01 Definition of Default

(a) If during the Term:-

- (1) the Yearly Rental is not paid within THREE (3) months after becoming due whether or not demand therefor has been made; or
- (2) the Lessee breaches any of the terms covenants conditions or obligations on the part of the Lessee contained herein other than in respect of the payment of Yearly Rental and the breach continues for TWENTY EIGHT (28) days after notice has been served on the Lessee by the Lessor; or
- (3) the Lessor has given notice to the Lessee more than 3 times in any 12 month period in respect of the same breach of this Lease;

THEN the Lessor may at any time thereafter either by notice in writing to the Lessee determine the Term and from the date of giving notice the Term will determine absolutely or without any notice or demand enter and repossess the Demised Premises and thereby the Term and the estate and interest of the Lessee in the Demised Premises will immediately determine but in both cases without affecting any rights of the Lessor under this Lease and without releasing the Lessee from liability in respect of the Lessee's Covenants. Upon re-entry or determination by notice the Lessor will have the right to pull down take away or otherwise sell or dispose of any buildings and improvements on the said Demised Premises and either retain the proceeds of sale for its own use absolutely or the Lessor may (in its absolute discretion) refund all or part of the net proceeds of sale thereof to the Lessee. The Lessee expressly and irrevocably authorises

the Lessor to deduct from the net proceeds of any such sale all moneys which may be owing by the Lessee to the Lessor on any account whatsoever and to pay to the Lessee the balance of the net proceeds after deduction thereof.

13.02 Damages after Re-entry

- (a) Each of the Lessee's Covenants specified in this paragraph are essential terms of the Lease created by this Deed;
 - (i) Clause 2.01 - Covenant to pay Yearly Rental;
 - (ii) Clause 4.01 - Covenant as to Use of Premises;
 - (iii) Clause 4.03 - Covenant as to Annoying or Injurious Conduct;
 - (iv) Clause 11.01 - Covenants relating to Assignments and Sub-letting;
 - (v) Clause 18.01 - Additional Terms and Conditions;
 - (vi) Clause 19.00 – Reticulated Water and Sewerage.
- (b) In respect of the Lessee's obligations to pay Yearly Rental the acceptance by the Lessor of arrears or of any late payment of Yearly Rental will not constitute a waiver of the essentiality of the Lessee's obligation to pay Yearly Rental in respect of those arrears or of the late payments or in respect of the Lessee's continuing obligation to pay Yearly Rental during the Term.
- (c) The Lessee covenants to compensate the Lessor in respect of any breach of an essential term of the Lease created by this Deed and the Lessor is entitled to recover damages from the Lessee in respect of any breach and the Lessor's entitlement under this clause is in addition to any other remedy or entitlement to which the Lessor is entitled including the right to terminate the Term and the Lease created by this Deed.
- (d) If the Lessee's conduct whether acts or omissions constitutes a repudiation of the Lease created by this Deed or of the Lessee's Covenants or constitutes a breach of any of the Lessee's Covenants the Lessee covenants to compensate the Lessor for the loss or damage suffered by reason of the repudiation or breach.
- (e) The Lessor will be entitled to recover damages against the Lessee in respect of repudiation or breach of any of the Lessee's Covenants for the damage suffered by the Lessor during the entire Term.
- (f) The Lessor's entitlement to recover damages will not be affected or limited by any of the following:-
 - (i) Abandonment or vacation of the Demised Premises by the Lessee;
 - (ii) Election to re-enter or to terminate the Term and the Lease created by this Deed by the Lessor;
 - (iii) Acceptance of the Lessee's repudiation by the Lessor; or
 - (iv) Conduct of the parties constituting a surrender of the Lease by operation of law.

- (g) The Lessor will be entitled to institute legal proceedings claiming damages against the Lessee in respect of the entire Term including the periods before and after the Lessee vacates the Demised Premises and before and after the abandonment termination repudiation acceptance of repudiation or surrender by operation of law referred to in paragraph (f) whether the proceedings are instituted either before or after that conduct.
- (h) If the Lessee vacates the Demised Premises whether with or without the Lessor's consent the Lessor will be obliged to take reasonable steps to mitigate his damages to endeavour to lease the Demised Premises at a reasonable rent and on reasonable terms and the Lessor's entitlement to damages is to be assessed on the basis that the Lessor should have observed the obligation to mitigate damages contained in this paragraph and the Lessor's conduct taken pursuant to the duty to mitigate damages will not by itself constitute acceptance of the Lessee's breach or repudiation or a surrender by operation of law.

13.03 Lessor may Rectify

If the Lessee fails to pay any money or charge as required hereunder to any person other than the Lessor or if the Lessee fails to perform any covenant on the part of the Lessee hereunder the Lessor may as the agent of the Lessee make that payment or do any act or thing and incur any expense necessary to perform that covenant and the full amount of the payment made and the cost and expense incurred will constitute a liquidated debt due and owing by the Lessee to the Lessor and shall be paid by the Lessee to the Lessor on demand.

13.04 Interest on Overdue Payments

If the Lessee fails to pay to the Lessor any money within SEVEN (7) days from the due date for payment then without prejudice to any of the Lessor's rights pursuant to clause 13.01 the Lessee shall pay to the Lessor on demand interest thereon or on so much thereof as remains unpaid from the due date or dates for payment until the same is actually paid and also upon any judgment which the Lessor obtains against the Lessee from the date of judgment until the judgment is satisfied at the rate which is at the time the payment becomes due or the judgment is obtained equal to the rate per cent per annum determined in accordance with Section 6.51 of the Local Government Act 1995 (as amended). The certificate of the Lessor shall be conclusive proof of such rate.

13.05 Non-waiver

The waiver by the Lessor of a default or breach by the Lessee of a term covenant or condition hereof will not in any circumstance entitle the Lessee to repeat or continue the default or breach nor is the waiver to be construed or operate as a waiver of any subsequent default or breach whether of a like nature or not.

14. DETERMINATION OF TERM

14.01 Lessee to Yield Up

At the expiration or sooner determination of the Term the Lessee shall yield up the Demised Premises in the order and condition described in clauses 4 and 5 hereof and consistent with the Lessee having observed and complied with those clauses and remediate any contamination of or to the Demised Premises or the surrounding area arising from or connected with the use and occupation of the Demised Premises by the Lessee or the Lessee's servants or agents

14.02 Lessee's Obligation to Remove Fittings

The Lessee shall within FOURTEEN (14) days after the expiration of the Term or immediately prior thereto remove from the Demised Premises all the Lessee's fixtures and fittings and improvements which are erected or installed on the Demised Premises unless consent for such fixture fittings or improvements to remain on the Demised Premises is obtained from the

Lessor and the Lessee shall make good to the satisfaction of the Lessor all damage caused to the Demised Premises by the removal.

14.03 Abandoned Fittings Belong to Lessor

Any fixture or fitting or improvement not removed by the Lessee either as of right or by requirement of the Lessor as aforesaid will at the Lessor's election become the property of the Lessor and the Lessor will not be liable to the Lessee or any person claiming through the Lessee to compensate for the acquisition by the Lessor of those buildings structures and other fixtures and fittings.

14.04 Holding Over

If the Lessee with the consent of the Lessor remains in occupation of the Demised Premises after the expiration of the Term then in absence of an express agreement in writing to the contrary and notwithstanding the payment by the Lessee (and acceptance by the Lessor) of Yearly Rental for a period greater than one month the Lessee will be deemed to hold the Demised Premises as tenant from month to month at a monthly rental equal to ONE TWELFTH (1/12) of the Yearly Rental payable hereunder at the date of expiration of the Term (the rental being payable monthly in advance) and otherwise on the terms and conditions of this Lease so far as they can be applied to a monthly tenancy.

15. GENERAL PROVISIONS

15.01 Notice to Lessee and Acts to be Done by the Lessee

An invoice notice or demand in writing required to be given by the Lessor to the Lessee may be given by the Lessor or its solicitors or agents and may be forwarded to the Lessee by prepaid registered mail service addressed to the Lessee at the Lessee's last known address or registered office (if any) in Western Australia and the notice or demand if sent by post will be deemed to have been given on the fourth business day next following the day on which it is posted.

15.02 Notice to Lessor

If a notice or demand in writing is required to be given by the Lessee to the Lessor the Lessee shall forward it to the Lessor by prepaid registered mail service addressed to the Lessor at its abovementioned address or the address which at the time of giving notice or demand is the then current address of the Lessor and a notice or demand if sent by post is deemed to be given on the fourth business day next following the day on which it is posted.

15.03 Easements

The Minister for Lands and / or the Lessor may for the purpose of providing public or private access to or egress from the Land support of structures hereafter erected on adjoining land or services including water sewerage drainage gas electricity and telephonic or electronic communications or services grant rights of support enter into any arrangement or agreement with any person and may dedicate transfer grant or create any land easement, right of carriageway or privilege in favour of any person who owns or occupies any adjoining or neighbouring land over or affecting the Demised Premises and this Lease will be deemed to be subject to each agreement arrangement right easement or privilege however and whensoever created PROVIDED THAT the Lessor shall use reasonable endeavours not to cause any undue inconvenience to the enjoyment of the Demised Premises by the Lessee.

15.04 Non-Merger

The terms and conditions of this Lease or any act matter or thing done under by virtue of or in connection with this Lease or any other agreement between the parties hereto will not operate as a merger of any of the rights and remedies of the parties in or under this Lease or in or under any other agreement all of which will continue in full force and effect.

- 15.05 Lessor Not Liable to Third Parties
The Lessor will not be responsible for loss damage or injury to any person or property or the effects of the Lessee or any other person in or about the Demised Premises or the Land however occurring whether arising from the operation of or failure to operate any of the appurtenances public utility services or other machinery therein or not.
- 15.06 Severance
If any part of this Lease is or becomes void or unenforceable then that part is or will be severed from this Lease so that all parts not void or unenforceable remain in full force and effect and unaffected by that severance.
- 15.07 Arbitration
Any disputes between the parties hereto arising out of or in connection with the Lease or as to the liability of any party hereunder may prior to the commencement of proceedings in any court of competent jurisdiction be referred by either party to the decision of a single arbitrator in accordance with the provisions of the Commercial Arbitration Act 1985 and for the purposes of Section 20 thereof it is agreed between the parties that each of them shall if they so wish be represented at any hearing under the said Act by qualified legal practitioners or by any parties they may wish to appoint.
- 15.08 Lessor May Act by Agent
All acts and things which the Lessor is required or empowered to do under this Lease may be done by the Lessor or the solicitor agent contractor or employee of the Lessor.
- 15.09 Exercise of Powers
The Lessor may exercise all rights conferred upon the Lessor by this Lease ("Lessor's Powers") without any proof of default by the Lessee the continuance of that default or any notice being required (other than as provided in this Lease) and notwithstanding any lapses neglect or previous waiver by the Lessor in respect of any of the Lessee's Covenants or the exercise of any of the Lessor's Powers.
- 15.10 Statutory Powers
The powers conferred by or under any statute (except to the extent inconsistent with the terms and provisions expressed in this Lease) are in augmentation of the powers conferred on the Lessor by this Lease.
- 15.11 Proper Law
This Lease is governed by the laws of Western Australia and each party irrevocably submits to the exclusive jurisdiction of the courts of Western Australia and agrees that proceedings arising in respect of this Lease (including appellate proceedings) may only be brought in those courts.
- 15.12 Effect of Execution
Upon execution by the Lessor this Lease is binding upon each person who has executed it notwithstanding:
- (a) the failure of any other person named as a party to execute it;
 - (b) the avoidance or unenforceability of any part of this Lease; or
 - (c) the avoidance or unenforceability of this Lease or any part of this Lease against any signatory or intended signatory.

16. FURTHER TERM

16.01 No Option of Renewal

The Lessee shall have no option of renewal to extend the Term however if at the expiration of the Term of the Lease the Lessee is not in default of this Lease, and if this Lease has not been terminated by the Lessor pursuant to clause 13, and if the Lessor intends to grant a further lease of the Demised Premises at that time, then the Lessor shall inform the Lessee of the terms and conditions upon which the Lessor intends so doing and the Lessee shall have the first right of refusal to take up a new lease upon those terms and conditions. The first right of refusal must be exercised by the Lessee in writing in the manner and within the time specified by the Lessor at that time for that purpose (as to which time is of the essence) and if the Lessee fails for any reason to exercise that right strictly in accordance with the Lessor's specifications then the Lessee shall be deemed to have waived the right of first refusal and in that case the Lessor may lease the Demised Premises to any other party on terms and conditions not more favourable (as to term, rent or otherwise) than were notified to the Lessee pursuant to this clause.

17. APPROVALS

17.01 Ministerial Approval

This Lease and all proposed assignments hereof and sub-leases as permitted in accordance with clause 11 hereof shall be subject to the approval and consent of the Minister for Lands or an officer authorised on that behalf by the Minister and endorsed accordingly whereafter the terms and conditions hereof will be operative.

18. ADDITIONAL TERMS AND CONDITIONS

18.01 Additional Terms and Conditions

The covenants conditions terms and conditions (if any) set out in Item 7 of the Schedule shall form part of and shall be deemed to be incorporated in the terms of this Lease and shall have full force and effect and be binding upon the Lessee and the Lessor as if the same had been herein repeated at length.

19. RETICULATED WATER SUPPLY AND SEWERAGE SERVICE

19.01 Water Supply Condition

- a. It is a material condition of this Lease that the Lessee will at its sole expense and risk connect the Demised Premises within the period specified by the Lessor in clause 19.01(b) to any reticulated potable water supply suitable for the Demised Premises that becomes available to the settlement of Peaceful Bay, such reticulated potable water supply having been provided by an Economic Regulation Authority (under the Water Services Licensing Act 1995) or by way of a private scheme which has been so approved in writing by the Lessor, the Department of Health and the Department of Environment and Conservation.
- b. The Lessor will in writing both advise the Lessee when a reticulated potable water supply has been installed to the settlement of Peaceful Bay and will also specify a date by which the connection by the Lessee required by clause 19.01(a) must be effected being a date to be decided by the Lessor in its sole discretion but being no less than one month and no more than two years after the date of such written notification to the Lessee by the Lessor of such installation.

19.02 Sewerage Condition

- a. It is a material condition of this Lease that the Lessee will at its sole expense and risk connect the Demised Premises within the period specified by the Lessor in clause 19.02(b) to any reticulated deep sewerage service suitable for the Demised Premises that becomes available to the settlement of Peaceful Bay, such reticulated deep sewerage service having

been provided by an Economic Regulation Authority (under the Water Services Licensing Act 1995) or by way of a private scheme so approved in writing by the Lessor, the Department of Health and the Department of Environment and Conservation.

- b. The Lessor will in writing both advise the Lessee when a reticulated deep sewerage service has been installed to the settlement of Peaceful Bay and will also specify a date by which the connection by the Lessee required by clause 19.02(a) must be effected being a date to be decided by the Lessor in its sole discretion but being no less than one month and no more than two years after the date of such written notification to the Lessee by the Lessor of such installation.

19.03

Assignment Condition

- a. The Lessee agrees that it is a material condition of this Lease that the Lessor will not consent to an assignment of this Lease unless the Demised Premises are both connected to a reticulated water supply in accordance with clause 19.01 and a deep reticulated sewerage service in accordance with clause 19.02.
- b. At the Lessor's sole option, the Lessor may waive the requirement specified in clause 19.03(a) and provide consent to the assignment of this Lease if the proposed assignee enters into an enforceable agreement with the Lessor to honour the requirements undertaken by the Lessee pursuant to clauses 19.01 and 19.02.

THE SCHEDULE

THE LESSEE:

Name(s): «Owner_1»
 «Owner_2»
 «Owner_3»
 «Owner_4»
 «Owner_5»
 «Owner_6»
 «Owner_7»

Address: «Postal_Address__1»
 «Postal_Address__2»
 «Postal_Address__3»

ITEM 1

(Operative Part)

Demised Premises:

That part of the Land means Class A Reserve No 24510 comprising Lot 1424 on Deposited Plan 202471 and Lots 1423 and 2229 on Deposited Plan 240012 being the whole of the land comprised in Qualified certificate of Crown land title Volume 3122 Folio 555.

AND BEING Site «Lot_No» the subject of Subsidiary Title Volume «Volume» Folio «Folio».

ITEM 2

(Operative Part)

Date of Commencement

First (1st) day of July 2010.

ITEM 3

(Operative Part)

Termination Date

Midnight on the Thirtieth (30th) day of June 2031.

ITEM 4

Yearly Rental

The sum of \$«VALUE» per annum paid annually in advance.

Address for payment of Yearly Rental

Until further notice to:
The Chief Executive Officer
Shire of Denmark
PO Box 183
Denmark WA 6333.

ITEM 5

Permitted Use

Holiday cottage which shall not be occupied for any single consecutive period of THREE (3) months or combined period or several short term periods which in total are greater than SIX (6) months in any one Rental Year, without the prior written consent of the Lessor.

ITEM 6

Lessee's Insurances :

In the name of the Lessee a policy to cover the Lessee's fixtures, fittings and improvements as the Lessee deems necessary or desirable.

In the name of the Lessee and (if so required by the Lessor) the Lessor for their respective interests a comprehensive public liability policy relating to the Demised Premises and the improvements thereon with cover of ten million dollars per claim or such other sum as the Lessor from time to time nominates.

ITEM 7

Additional Terms and Conditions

1. Notwithstanding anything hereinbefore contained to the contrary the Lease may at any time during the term hereof be terminated:
 - (a) by the Lessee on the giving to the Lessor of three (3) months' notice in writing of his intention so to do. On the date of the expiration of the Lessee's notice this Lease shall absolutely cease and determine noting that the Lessee is to deliver possession of the Demised Premises to the Lessor in such state of repair and condition which is consistent with the proper performance by the Lessee of the covenants contained in the lease;
 - (b) by agreement between the Lessor and the Lessee on any other date as may be agreed; or
 - (c) by the Lessor if for any reason the Lessor's right or title in and to the Land is withdrawn or in any other way affected such that the Lessor is unable to grant to the Lessee the rights and entitlements herein.
2. In the event of any dispute between the parties as to the date upon which a reticulated water supply and/or a sewerage service is connected to or available at Peaceful Bay, the certificate of the Lessor shall be conclusive proof.
3. The Lessee hereby indemnifies and agrees to fully and effectively keep indemnified the Lessor against all costs, expenses, liabilities and claims for moneys expended or incurred or paid by the Lessor or for which the Lessor may be or become liable to pay at any time and from time to time as the result of the failure or refusal by the Lessee to connect the Demised Premises to the reticulated water supply or sewerage service in accordance with the terms of this Deed.
4. Neither party will have any claim for compensation in respect of the termination of the lease under this provision provided that nothing in this provision prejudices or affects any rights, powers or actions of the Lessor in respect of any breach of the terms or covenants in this lease by the Lessee arising before termination of the lease under this provision.

ATTESTATION SHEET

Executed by the parties as a Deed on the _____ day of _____ in the year _____

LESSOR/LESSORS SIGN HERE (NOTE 9)

THE COMMON SEAL of the)
SHIRE OF DENMARK)
was hereunto affixed in)
the presence of :)

..... Shire President, Cr Ross Thornton

..... Chief Executive Officer, Mr Dale Stewart

LESSEE/LESSEES SIGN HERE (NOTE 9)

Signed

Signed

In the presence of

In the presence of

Signed

Signed

In the presence of

In the presence of

Signed

Signed

In the presence of

In the presence of

Signed

In the presence of

INSTRUCTIONS
<ol style="list-style-type: none"> 1. If insufficient space in any section, Additional Sheet Form B1 should be used with appropriate headings. The boxed sections should only contain the words "See Annexure". 2. Additional Sheets shall be numbered consecutively and bound to this document by staples along the left margin prior to execution by parties. 3. No alteration should be made by erasure. The words rejected should be scored through and those substituted typed or written above them, the alteration being initialed by the person signing this document and their witnesses. 4. Duplicates are not issued for Crown Land Titles.
NOTES
<ol style="list-style-type: none"> 1. DESCRIPTION OF LAND Lot and Diagram/Plan number or Location name and number to be stated. Extent – Whole, part or balance of the land comprised in the Certificate of Crown Land Title to be stated. The Certificate of Crown Land Title Volume and Folio number to be stated. 2. ENCUMBRANCES To be identified by nature and number, if none show "nil". 3. LESSOR State full name and address of Lessor/Lessors and the address/addresses to which future notices can be sent. 4. LESSEE State full name of Lessee/Lessees and the address/addresses to which future notices can be sent. If two or more state tenancy eg. Joint Tenants, Tenants in Common. If Tenants in Common specify shares. 5. TERM OF LEASE Term to be stated in years, months and days. Commencement date to be stated. Options to renew to be shown. 6. RECITE ANY EASEMENTS TO BE CREATED Here set forth Easements to be created as appurtenant to the lease commencing with the words "together with" and/or any Reservations hereby created encumbering the lease commencing with the words "reserving to". 7. RENTAL State amount in words. 8. PAYMENT TERMS State terms of payment. Eg, by instalments of \$..... payable on theday of each month/the months of in each year, commencing with a payment of \$..... on or before the day of...../execution of this lease by the Lessee. 9. EXECUTION A separate attestation is required for every person signing this document. Each signature should be separately witnessed by an Adult Person. The address and occupation of witnesses <u>must</u> be stated.
EXAMINED

Office Use Only

LEASE OF CROWN LAND (L)

LODGED BY	Shire of Denmark
ADDRESS	PO Box 183 DENMARK WA 6333
PHONE No.	9848 0300
FAX No.	9848 1985
REFERENCE No.	
ISSUING BOX No.	

PREPARED BY	Shire of Denmark
ADDRESS	PO Box 183 Denmark WA 6333
PHONE No.	9848 0300
FAX No.	9848 1985

INSTRUCT IF ANY DOCUMENTS ARE TO ISSUE TO
OTHER THAN LODGING PARTY

TITLES, LEASES, DECLARATIONS ETC LODGED HEREWITH

1.	<hr/>	Received Items
2.	<hr/>	Nos.
3.	<hr/>	
4.	<hr/>	Receiving Clerk
5.	<hr/>	
6.	<hr/>	

Registered pursuant to the provisions of the TRANSFER OF LAND ACT 1893 as amended on the day and time shown above and particulars entered in the Register.



Our Ref

Your Ref

KR:SM:DENM-29989

30 May 2012

Mr Dale Stewart
Chief Executive Officer
Shire of Denmark
PO Box 183
DENMARK WA 6333



Stirling Law Chambers
220-222 Stirling Highway
Claremont WA 6010
Tel (08) 9383 3133
Fax (08) 9383 4935
Email: mcleods@mcleods.com.au

Denis McLeod
Neil Douglas
Fiona Grgich
David Nadebaum
Geoff Owen
Andrew Roberts
Craig Starke
Peter Wittkuhn
Elisabeth Stevenson (Special Counsel)
David Nicholson (Senior Associate)
Peter Gillett (Senior Associate)
Trudi Firth (Associate)

By email: ceo@denmark.wa.gov.au

Dear Dale

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

I refer to your letter dated 7 July 2011. I also refer to your email dated 24 May 2012.

You raised numerous issues for advice, most of which individually were difficult or complex or both. That accounted for the delay which, however, is regretted.

In relation to the costs for this advice, a substantial amount of work has gone into the advice. I accept however, that it may be more extensive than you anticipated. For that reason, we will provide a substantial reduction on our ordinary fees. I am looking at our records and will contact you about the fees shortly to ensure that you are happy on that count.

Request for advice

You have requested advice regarding the obligations of the Shire of Denmark in relation to the 203 private holiday cottages situated in Class A Reserve No. 24510 (**the Property**), which is managed by the Shire. In particular, you have posed the following questions:

- 1 Questions arising regarding the nature of approval required for an application for development or demolition on the Property
 - 1.1 Is the lessee considered to be the owner of the Property under cl.3 of the definition of 'owner' in the Shire of Denmark Town Planning Scheme No. 3 (the Scheme)?
 - 1.2 Is the Shire's consent required as the lessor under the Lease in addition to the Shire providing planning approval under the Scheme?
 - 1.3 Can the Shire deny approval as the 'owner' or 'lessor' (ie. prior to submission of a development application)?
 - 1.4 If so, what rights of appeal or of compensation etc exist for the applicant/lessee against the decision to deny approval?

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

- 1.5 Is the Shire's ability to refuse a request to demolish a cottage compromised if it has not inspected or enforced the requirements under the Lease for repair etc?
- 2 Questions regarding what legal responsibilities the Shire may have in relation to undertaking inspections and enforcing maintenance of the cottages
 - 2.1 Does the Shire have any duties of care or other legal responsibilities to require it to undertake regular inspections and enforce maintenance of cottages by the lessees?
 - 2.2 Should the Shire amend its policy in relation to property inspections?
 - 2.3 If a cottage is replaced with a new building, does the lessee have the right (or the obligation) to remove the new building (ie. is the new building considered an 'addition')?
- 3 Questions regarding planning and policy framework for decision making in relation to the cottages
 - 3.1 Is there any conflict between the Shire's legal obligations and the Conservation Plan and Town Planning Policy
 - 3.2 Can we give criteria to guide Shire in a decision to deny or support an application for demolition?

Background

- (a) The Shire leases the cottages and you have provided a sample copy of the Lease Agreement (**Lease**). I understand that the Leases for all the cottages commenced on 1 July 2010 for a period of 21 years and will expire on 30 June 2031. Relevant provisions of the Lease include -

5.01 Inspection by Lessor

The Lessor or its duly authorised agents may with or without workmen and others at all reasonable times enter upon and view the state of repair of the Demised Premises.

5.02 Maintenance of Demised Premises

At its own expense the Lessee shall at all times during the Term and otherwise for so long as the Lessee remains in occupation of the Demised Premises maintain the Demised Premises and all improvements placed thereon by the Lessee in good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor (damage by fire storm tempest earthquake and explosion excepted).

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

6.01 No alteration without Consent

The Lessee shall not make or cause to be made any structural or other alteration or addition to the Demised Premises without first submitting to the Lessor full detailed drawings and specifications of the proposed works and first obtaining the Lessor's consent in writing.'

- (b) The Original Peaceful Bay Settlement is listed as a Place of Heritage Value under the Scheme and is also subject to the Peaceful Bay Conservation Plan and Town Planning Scheme Policy No. 35 (**Conservation Policy**), which you have also provided. This is discussed further below.
- (c) In April 2011, a lessee of a cottage lodged an application to demolish a cottage and to construct a holiday cottage and outbuilding. The lessee had received advice in 2009 that the repairs required to the cottage were greater than the cost of rebuilding. In May 2011, Shire staff undertook an inspection of the premises and identified the following need for repairs:
- Roof leaking, causing dampness in the building;
 - Roof is bowing/sagging at the rear of the cottage;
 - Some roof and external timbers are rotting;
 - Uneven internal floor;
 - Unevenness with verandah floor including floorboards lifting/moving; and
 - The cottage is lined with blue asbestos.
- (d) The Shire, as lessor under the Lease, determined not to consent to the application at its Council Meeting of 28 June 2011, the Minutes of which you have also provided (**Minutes**).

Questions for advice

The questions that you have raised in your letter, together with my responses, are set out and numbered below. In order to avoid repetition, I have not repeated all of the questions which you have asked where I considered that the response has been covered under another question. Please let me know, however, if you have any outstanding queries.

Summary of advice

The Shire has a duty of care, under the common law principle of negligence to take reasonable care to avoid foreseeable risk of injury.

The lessee, however, has a particularly onerous obligation under the lease to maintain the premises in a "good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor". In my view, while the lease is in place, the responsibility to maintain the property in a safe state transfers to the lessee. The lessee will also have responsibilities to take reasonable care to ensure that a person entering the premises will not suffer injury by reason of any dangers which are due to the state of the premises, as the occupier under the *Occupier's Liability Act 1985 (OL Act)*.

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The Shire must still ensure it takes reasonable care and, in order to effect that, we recommend conducting regular inspections and enforcing obligations of the lessees in relation to maintenance and repair.

Some uncertainty will arise as to the extent of repairs required by the tenant under the lease where the Shire has entered into new leases for cottages that are in a poor state of repair at the commencement of the lease. The obligations upon the lessee to maintain the cottages will normally be to the same state as at the commencement of the lease. The lessee's obligations under the OL Act, will also be relevant here.

I recommend that the Shire undertake the actions set out at 2.2, including inspections of the premises, and enforcement of the repair obligations under the lease.

Advice

1 Questions arising regarding the nature of approval required for an application for development or demolition on the Property

1.1 Is the lessee considered to be the owner of the Property under cl.3 of the definition of 'owner' in the Shire of Denmark Town Planning Scheme No. 3 (the Scheme)?

Under the Scheme, the Shire is considered to be the owner of the Property.

The Scheme provides the following definition of owner -

“owner” - in relation to any land includes the Crown and every person who jointly or severally whether at law or in equity:

- (a) is entitled to the land for an estate in fee simple in possession; or
- (b) is a person to whom the Crown has lawfully contracted to grant the fee simple of the land; or
- (c) is a lessee or licensee from the Crown; or
- (d) is entitled to receive or is in receipt of, or if the land were let to a tenant, would be entitled to receive the rents and profits thereof, whether as a beneficial owner, trustee, mortgagee in possession, or otherwise.’

Applying that definition, the lessee would not be considered the owner under the Scheme. Under para.(c) of the definition of ‘owner’ in the Scheme, an owner, in relation to Crown land, includes ‘a lessee or licensee from the Crown’. In the Peaceful Bay Reserve, the Shire of Denmark is the lessor. Even though the land is Crown land, it is leased from the Shire, which is not the Crown or an agency of the Crown.

The Shire is the owner of land under para.(d) of the Scheme’s definition, as it has the power to grant a lease over the land under the Management Order and is entitled to receive the rents and profits of any such lease.

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1.2 Is the Shire's consent required as the lessor under the Lease in addition to the Shire providing planning approval under the Scheme?

The Shire's consent is required at two stages for a request for development of the cottages. These are separate requirements for Shire consent, granted under different provisions of the Scheme, and the Lease.

Firstly, the Shire's consent is required as the lessor of the cottages under cl.6.01 of the Lease, which provides -

'The Lessee shall not make or cause to be made any structural or other alteration or addition to the Demised Premises without first submitting to the Lessor full detailed drawings and specifications of the proposed works and first obtaining the Lessor's consent in writing'.

The Scheme also requires the owner to have signed the application for planning approval, as set out in the form in Appendix III and provided in cl.6.3.1 of the Scheme. We understand this is also required by the Shire's Procedure *OP040239: Construction of New or Significant Alterations to Building Structures on Shire Land* (as referred to in the Minutes).

Secondly, any alteration, demolition or construction on the property requires planning approval from the Shire under cl.6.1.1 of the Scheme. Additionally, as a result of the status of the settlement as a place of heritage value, cl.7.2 of the Scheme also applies. It provides -

'A person shall not without the approval of the Shire at or on a place of Heritage Value, carry out any development including, but without limiting the generality of the foregoing:

- (a) the erection, demolition or alteration of any building or structure (not including farm fencing, wells, bore or troughs and minor drainage works ancillary to the general rural pursuits in the locality);
- (b) the removal, felling, lopping, topping or damaging of trees associated with Places of Heritage Value;
- (c) the erection of advertising signs; and
- (d) clearing of land.'

1.3 Can the Shire deny approval as the 'owner' or 'lessor' (ie. prior to submission of a development application)?

The Shire may deny approval to a request for development or demolition in its role as the lessor under the Lease and owner under the Scheme, provided it has a reasonable basis for doing so.

I note that the decision by the Shire to refuse its consent to a request to demolish an existing cottage and build a new holiday cottage and outbuilding was based on the Lease provisions (notably those requiring the lessee to maintain the cottages in 'good ... substantial repair and condition'), the Conservation Policy and the Peaceful Bay

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Heritage Precinct Conservation Plan (PBHPCP). These documents give the Shire a reasonable basis for forming its decision, however they must be considered in light of the Shire's legal obligations, particularly in negligence, as discussed further below.

1.4 If so, what rights of appeal or of compensation etc exist for the applicant/lessee against the decision to deny approval?

Manner of appeal or challenge

A lessee can bring any dispute it may have in relation to the Lease to arbitration in accordance with the *Commercial Arbitration Act 1985*, prior to commencement of proceedings in any Court of competent jurisdiction, in accordance with cl.15.07 of the Lease.

A lessee could also choose to commence proceedings in a Court, if it had a legal basis for doing so.

Additionally, if the Shire had made a planning decision on the matter, for example to refuse a request for planning approval, the lessee could apply to the State Administrative Tribunal for a review of the decision.

Potential grounds of appeal or challenge

Breach of contract

If a lessee sought to challenge a decision of the Shire to refuse its consent to a proposed development as the lessor and owner, it may seek to do so on the basis of breach of contract, and claim damages for any loss that it may have incurred as a result of the breach by the Shire.

Possible grounds upon which a challenge could be raised under breach of contract include breach of an implied duty to act reasonably. Contracts would generally be construed as incorporating an implied obligation on both parties to do what is normally and reasonably necessary to enable fulfilment of the contract. A lessee may attempt to mount a claim that the failure of the Shire to grant consent prevents the lessee from being able to fulfil its obligations in relation to maintenance and repair.

Rescission for misrepresentation

Alternatively, the lessee may seek to rescind the Lease on the grounds of misrepresentation and misleading conduct if it believed the Shire had made statements or conducted itself in a manner that encouraged the lessee to sign the Lease, which turned out to be false (whether innocent or otherwise). On the facts as we understand them, it is unlikely the lessee in question would attempt to rescind the Lease.

The Minutes refer to discussions between the lessee and the Shire prior to the Lease being entered into and prior to the development application being made, after which the lessee decided it should wait until the new Lease was in place before progressing

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further. Depending upon what, if any, representations Shire employees made, of which we have no knowledge, this could provide a basis for action.

A failure by the Shire to provide approval could also be relevant if the lessee made a claim in negligence. The Shire's duties in this regard are discussed below.

It is, however, speculative to consider the grounds of a hypothetical challenge to a decision on the basis of the limited information that we have. Other than identifying these possible areas of challenge, I do not think it appropriate to spend further time at the present time on this issue.

1.5 Is the Shire's ability to refuse a request to demolish a cottage compromised if it has not inspected or enforced the requirements under the Lease for repair etc?

The Shire has the right to inspect under the Lease, not an obligation. The lessee can't transfer the obligation under the Lease to maintain and repair to the lessor. However if it could be shown on the facts that the Shire was aware the lessee was not monitoring and repairing in accordance with cl.5.02, the right to refuse approval to demolish may be affected. There may also be a consequence in negligence as discussed below.

2 Questions regarding what legal responsibilities the Shire may have in relation to undertaking inspections and enforcing maintenance of the cottages

2.1 Does the Shire have any duties of care or other legal responsibilities to require it to undertake regular inspections and enforce maintenance of cottages by the lessees?

The Shire may have legal responsibilities to inspect and enforce maintenance of the cottages under contract (ie. in the Lease), statute and the common law of negligence.

Contractual Obligations

Maintenance and Repair

Cl.5.02 of the Lease imposes an obligation upon the lessee to 'maintain' the premises in 'good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor (damage by fire storm tempest earthquake and explosion excepted)'.

This provision clearly places the responsibility for repair on the lessee (with the exception of damage by fire, storm, tempest, earthquake and explosion) and will overcome obligations that a landlord would otherwise have to undertake structural repairs of the property under the OL Act or the RT Act, which are discussed below.

It is less clear whether this provision is strong enough to overcome obligations a landlord may have in negligence to take reasonable care to avoid a foreseeable risk of injury, particularly at the commencement of the Lease. This is also discussed further below.

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The NSW Supreme Court and Court of Appeal have considered similarly phrased term, “to keep in good and substantial repair the demised premises” in *Alcatal Australia Ltd v Scarcella* [2001] NSW CA 401. The Supreme Court described it as an “unusually onerous” obligation upon the lessee; like the Shire’s lease in this instance, there was no qualification that fair wear and tear is excepted and there was no obligation on the landlord to carry out any work; and the obligation to “keep” the premises was on a continuous basis. The same applies in this instance.

If the lessee has not undertaken these repairs throughout the life of the lease, the Shire may be able to claim damages for the cost of repairs. The standard to which a lessee is required to maintain the premises in “good and substantial repair” has been described as :

“Time must be taken into account. A 28-year building is not to be made new. But so far as repair can make good, or protect against the ravages of time and the elements, it must be undertaken. This means that if deterioration to the building is not evident after 28 years but would not have been evident, or evident to such a degree, if in earlier years maintenance or repairs which could have been undertaken had been undertaken, then the plaintiff is required to put the building in the condition in which it would have been if the maintenance had been undertaken in the earlier years. This may entail renewing subsidiary parts of the building (though not renewal of the whole building). The plaintiff is not allowed to neglect the building and then, by reason of the neglect, at a later date say that deterioration to the building which has occurred by reason of that neglect diminishes the extent of its obligation to put and keep the building in good and substantial repair. He is bound by seasonal application of labour to keep the premises as nearly as possible in the same condition as at the commencement of the lease” (*Alcatal Australia Ltd v Scarcella* [2001] NSW CA 401 at [57]).

In practical terms, the extent to which the lessee is required to upkeep the premises, factoring in the impacts of time, will depend upon the particular circumstances and what “a reasonably minded owner” would do.

Now that new leases have been entered into on the cottages, and the previous leases have terminated, it would be extremely difficult for the Shire to bring a claim for damages in relation to the repairs that need to be undertaken, as the obligation upon the lessee is to maintain the premises to the Shire’s “reasonable satisfaction”. The Shire’s actions, in making no complaint and commencing a new lease infer its “reasonable satisfaction” and it may be further that some of the premises are now in the possession of new tenants.

Further, the obligation for the lessee to maintain the premises will generally be to keep the premises in the same condition as at the commencement of the lease. Accordingly, where the new leases have been entered into in premises that are run down and in need of repair at the commencement of the lease, the lessees will not necessarily be obliged under the Lease to improve the condition of the properties.

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In my view, the lessee will still have to take responsibility for the care of the premises and keep them reasonably safe, as they bear the responsibility under the Lease and under the OL Act as the occupier (as discussed below).

Inspection

Cl.5.01 of the Lease authorises the Shire to undertake inspections of the property but does not, in itself, require the Shire to undertake such inspections. You have informed me that it has not been the Shire's practice to carry out inspections of the property.

Commercially, however, it is sensible to undertake inspections in order to enforce the obligations under the lease for the lessee to maintain the premises, in order to avoid the situation where the cost of repairs required outweigh the cost of replacing the entire building.

Inspections would also be a means to demonstrate the Shire is taking reasonable care to satisfy its obligations in negligence, as discussed below.

Statutory Obligations

Occupier's Liability Act 1985 (OL Act)

The OL Act sets a standard of care that occupiers and landlords of premises owe to persons and property on the premises.

Where a landlord is responsible for repair and maintenance of premises under a lease agreement, the OL Act imposes a duty of care upon the landlord towards any persons who may from time to time be on the premises, in respect of the repair and maintenance of the premises (s.9). In this instance, it is the lessee, not the landlord, who is responsible for repair and maintenance, therefore this obligation will not apply.

Where the premises are subject to a lease which grants exclusive possession, the tenant is ordinarily considered to be the occupier during the term of the lease and will therefore have an obligation to exercise reasonable care to ensure that a person entering on the premises will not suffer injury by reason of any dangers which are due to the state of the premises (s.5) (*Jones v Bartlett & Anor* (2000) 176 ALR 137 at 146). The landlord may, however, be considered to be the occupier prior to entering into the lease (*Jones v Bartlett & Anor* (2000) 176 ALR 137 at 146).

The Shire should not, therefore, be responsible under the OL Act in ordinary circumstances during the term of the lease. Prior to entering into a lease, however, it will most likely have a duty to exercise reasonable care to ensure that a person entering on the premises will not suffer injury by reason of any dangers which are due to the state of the premises, under the OL Act.

The standard of care that the Shire should exercise here is consistent with the standard of care under common law discussed below. In summary, it is described as "observing reasonable care to avoid a foreseeable risk of injury".

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If there was something to suggest that the property was defective, dangerous or, by reason of its age, hazardous, then the Shire would need to ensure that “reasonable care” was taken to avoid foreseeable injury.

In light of the age of the property and the need for repairs outlined in the Minutes, we think that as a minimum, the Shire should inspect the properties and enforce the requirements to repair the property under the lease.

In particular, it should take care prior to entering into leases, and ensure that it inspects and undertakes necessary repairs prior to the lease being entered into. In practical terms, it will assist if the Shire enforces the requirements for maintenance during the term of a lease.

Residential Tenancies Act 1987 (RT Act)

The RT Act imposes a responsibility on landlords of residential tenancies to ‘maintain the premises in a reasonable state of repair’ (eg. s.42).

On the basis of the information and the Lease that you have given me, I do not think that the RT Act applies to the Lease of the cottages because the tenancies do not meet the definition of residential tenancies under the Act. Significantly, the cottages may be used for holiday use only and lessees are not permitted to stay for more than three months consecutively, unless prior approval is given.

In any event, however, s.82(3) of the RT Act enables an owner and a tenant to contract out of the requirements of s.42 (for the owner’s responsibility for cleanliness and repairs) by excluding, modifying or restricting the requirements contained in the provisions, as long as the agreement is in writing and is signed by the owner and the tenant. In my view, the obligation upon the lessee to undertake maintenance and repairs in the existing Lease would be sufficient to contract out of those requirements, provided the Lease was in writing and signed by both parties.

Civil Liability Act 2002 (CL Act)

The CL Act operates along side the common law principles of negligence, discussed below, and formalises some exceptions to where a person will be liable to breaching a duty of care (*Department of Housing and Works v Smith (No 2)* [2010] WASCA 25). Section 5B clarifies that a person will not be held liable for harm caused by that person’s failing to take precautions against a risk, where –

- “(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);
- (b) the risk was not insignificant; and
- (c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.”

It also gives some guidance as to what consideration a ‘reasonable person’ would give to a decision to take precautions against a risk, namely –

- “(a) the probability that the harm would occur if care were not taken;
- (b) the likely seriousness of the harm;
- (c) the burden of taking precautions to avoid the risk of harm;
- (d) the social utility of the activity that creates the risk of harm”

Section 5N and 5O also provide exceptions where the risk was an obvious risk, (unless the person proves on the balance of probabilities that he or she was not aware of the risk).

In effect, however, these provisions are consistent with the common law.

Common law obligations

Negligence

A landlord can be liable to a tenant in negligence for injury caused by the defective state of premises. Traditionally, this was not the case, and the law is still in a state of development in this area.

The Judges of the High Court, in *Jones v Bartlett* (2000) 205 CLR 166, described the duty in different ways, including “to take reasonable care to put and keep the premises in a safe state of repair” [93], “to take reasonable care to avoid foreseeable risks of harm to the tenant and members of the tenant’s household” [57], and “to take reasonable care to avoid foreseeable risk of injury from defects of which the landlord was on notice, or of which (by appropriate inspection) the landlord would reasonably become aware” [252].

This principle has since been interpreted as imposing on the landlord an obligation to “observe reasonable care to avoid foreseeable risk of injury”. What constitutes a ‘reasonable’ amount of care will depend upon the circumstances, however, it does not necessarily mean that all foreseeable risks should be eliminated, even if they may be significant, as it may well be a reasonable response not to respond to such a risk.

For example, in *Department of Housing and Works v Smith (No 2)* [2010] WASCA 25, HomeWest was not responsible for the injury that Ms Smith sustained due to a depression in the lawn of the senior’s accommodation unit that she leased from HomeWest. A depression in the lawn had been left by the previous tenant extending 1 inch deep, by up to 2 feet in diameter. Even though the Court of Appeal accepted that the depression posed some risk to an elderly person living there, it was not a hazard of a kind “requiring some protection or warning” and was not a hazard at all for most people “taking reasonable care for their own safety”. The Court concluded that a reasonable person in the appellant’s position would not, in the circumstances, had filled in the depression [111].

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Similarly, the duty does not go as far as detecting latent defects, undetectable to the ordinary eye, or requiring experts to determine whether the construction fell short of current building standard, for example, whether building standards had changed over time to require a thicker level of glass to be used in sliding door (*Jones v Bartlett & Anor*), particularly if there was “nothing to suggest ... that the house was defective or dangerous, or that, by reason of its age, or condition, it was hazardous to occupy” (*Jones v Bartlett & Anor* at 147).

Consequently, if there was something to suggest that the property was defective, dangerous or, by reason of its age, hazardous, then the Shire would need to ensure that “reasonable care” was taken to avoid foreseeable injury.

Examples of what landlords have been found to be liable to tenants for include injuries caused by reasonably-foreseeable factors such as faulty electrical work, defective plumbing, faulty hot water service, dangerously muddy area around a water pump, and missing or defective balcony struts.

The question of what is reasonably foreseeable is not always clear and will depend on the particular facts and circumstances of the case, including the ‘obviousness’ of the defect and its ‘inherent danger’ to users.

Obligation to inspect

The Shire, as landlord, should inspect the premises, particularly prior to commencement of a Lease.

The Courts have found that a landlord can be liable for injury where it was reasonably practical for a landlord to inspect the premises and the injury resulted from factors that would have been reasonably discoverable on such an inspection (*Gration v C Gillan Investments Pty Ltd* [2005] 2 Qd R 267). The landlord does not have to go the extent of requiring experts to inspect the premises to find latent defects, unless they have been brought to the landlord’s attention.

While it seems settled that this obligation exists at the beginning of the tenancy, it is not clear whether the duty of care owed by a landlord continues to require inspection during the Lease, and continual maintenance, as this is still a matter being considered by the Courts. In my view, it is best to act prudently, as set out below at 2.2.

Extent of the Shire’s duty of care in relation to the cottages

In summary, the Shire may be responsible for injury that occurs as a result of a foreseeable risk, including injury resulting from factors that would have been reasonably discoverable on such an inspection where it was reasonably practicable for the Shire to do so prior to the commencement of the Lease. This obligation is more pertinent at the commencement of a Lease because the Shire has had control of the premises, and as such has the additional responsibility of being the occupier under the OL Act.

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Once the lease is in place, however, in my view the responsibility to maintain the property in a safe state transfers to the lessee. The lessee has a particularly onerous obligation under the lease to maintain the premises in a “good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor. The Shire must still ensure it takes reasonable care and, in order to effect that, we recommend conducting regular inspections and enforcing obligations of the lessees in relation to maintenance and repair.

Some uncertainty will arise as to the extent of repairs required by the tenant under the lease where the Shire has entered into new leases for cottages that are in a poor state of repair at the commencement of the lease. The obligations upon the lessee to maintain the cottages will normally be to the same state as at the commencement of the lease. The lessee’s obligations under the OL Act, will also be relevant here.

If the Shire was to act prudently, it would undertake the actions set out at 2.2 below.

2.2 Should the Shire amend its policy in relation to property inspections?

In our opinion, the Shire should undertake regular inspections and, if repairs are required, then the Shire should notify and require the lessee to undertake the necessary work. This would substantially reduce any burden of liability that the Shire may have in this regard, and shift that burden to the lessees.

In relation to existing Leases, I recommend inspecting the premises as soon as possible and requiring lessees to undertake necessary repairs.

I also recommend undertaking regular inspections for example on an annual basis, and requiring that lessees undertake necessary repair works.

Since a landlord has particular responsibilities under the OL Act and in negligence for ensuring the safety of the premises prior to a Lease being entered into, the Shire should pay particular attention to enforcing the maintenance obligations at the end of a Lease, and ensuring the cottages are reasonably safe and maintained prior to entering into a new Lease, or renewing an existing Lease.

I also recommend writing to lessees to inform them of the risk that they can be liable for any injury or damage caused by failure to maintain the premises, and requiring that they obtain necessary insurances. The Shire may not be able to enforce such a requirement, but it is a requirement that could be included in a new Lease.

For new Leases, a careful approach will need to be taken to the respective repair and maintenance obligations of the lessee and the lessee.

2.3 If a cottage is replaced with a new building, does the lessee have the right (or the obligation) to remove the new building (ie. is the new building considered an ‘addition’)?

The Lease places an obligation upon the lessee to remove all the lessee’s fixtures, fittings and improvements. Cl.14.02 of the Lease provides-

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‘The Lessee shall within FOURTEEN (14) days after the expiration of the Term or immediately prior thereto remove from the Demised Premises all the Lessee’s fixtures and fittings and improvements which are erected or installed on the Demised Premises unless consent for such fixture fittings or improvements to remain on the Demised Premises is obtained from the Lessor and the Lessee shall make good to the satisfaction of the Lessor all damage caused to the Demised Premises by the removal’.

This provision includes all fixtures, fittings and improvements, but only those of the lessee.

The Lease provision is consistent with the usual requirement for a tenant to remove ‘tenants’ fixtures’ from a premises. It should be noted however that items that are ‘so firmly affixed that removal would destroy their essential character or value or would substantially damage the realty’ are considered to be ‘landlord’s fixtures’ and are not to be removed by the tenant, even if the tenant brought them onto the property.

Historically, the Courts have treated a timber dwelling-house, resting by its own weight on brick foundations on land to be a fixture, because it had been brought onto the land with the intention of becoming part of the realty. If the house was considered to be a ‘fixture’, it would be classified as a ‘landlord’s fixture’ and would not be able to removed from the site by the lessee at the end of the Lease.

More recently, the Courts are considering a house not as a fixture, but as ‘part and parcel of the land’. This classification would remove the need to classify the house as a landlord’s or tenant’s fixture, since the house would be considered as part of the land and could not be removed by the lessee at the end of the Lease. This is a recent development of the law which has not, as yet, been confirmed by the High Court.

In any event, a lessee could not take from the land a house that it builds on the land, at the completion of the Lease, without authority of the lessee to do so.

A means of avoiding potential dispute over this issue would be to require, as a condition of the approval of undertaking significant improvements or construction of a new dwelling, confirmation that the improvements/new building remains the property of the Shire at the end of the Lease.

3 Questions regarding planning and policy framework for decision making in relation to the cottages

3.1 Is there any conflict between the Shire’s legal obligations and the Conservation Plan and Town Planning Policy

The Conservation Policy provides the following guidance to the Shire -

‘4.5.1 Retention

There should be no demolition or removal of any of the original sections of buildings that are classified as having some cultural heritage significance.

4.5.2 Conservation and Maintenance

The buildings which are classified as having considerable or some heritage value should be conserved and maintained.'

The Minutes also refer to the PBHPCP, though we have not been provided with a copy of that document. From the Minutes, I understand that the PBHPCP includes the property the subject of the request in the Peaceful Bay Heritage Precinct, which is considered to be a zone of 'considerable significance'. The Minutes also indicate that the Precinct is listed on the 1999 Municipal Heritage Inventory (MHI) as Category 'C' which provides to 'retain and conserve if possible'. Additionally, the draft 2011 MHI refers to the Precinct as having 'Exceptional' level of significance which 'should be retained and conserved unless there is no feasible and prudent alternative to doing otherwise'.

Together, the Conservation Policy, the PBHPCP and the MHIs (**the planning documents**) certainly provide some guidance to the Shire that there should be a strong inclination towards retention of the existing buildings and that there should be no demolition of the buildings, as far as is possible.

The planning documents stop short, however, of prohibiting demolition. They allow some scope for demolition if, for example, there was no feasible and prudent alternative to doing so.

In any event, the planning documents themselves are in the nature of policies, and should not be treated as binding (*Falc & Ors v State Planning Commission* (1991) 74 LGERA 68). They must be considered in light of the legal obligations of the Shire. In particular, it will be necessary for the Shire, if faced with a similar request in the future, to weigh up any duties in negligence that may be attributable to the Shire as lessor (discussed above).

If the Shire were to regularly inspect the cottages and require the maintenance of them, I do not see how there would be any conflict between the Shire's legal obligations and the requirements of the planning documents.

To provide guidance to the Shire staff and the Council in making decisions in relation to these properties, particularly in the interim period where lessees will be undertaking maintenance and may be making different applications for development, I recommend that the Shire prepares a policy to assist to weigh up the requirements of the planning documents, and the legal obligations of the Shire. To assist in this regard, I have suggested some criteria at 3.2 below.

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

3.2 Can we give criteria to guide Shire in a decision to deny or support an application for demolition?

- (1) Is the existing cottage habitable? Can it be used without risk of damage or injury or risk to health?
- (2) Could the cottage be made habitable by reasonable repair or restoration work, at a cost less than replacement cost?
- (3) Does the cottage alone or as part of a group have cultural heritage or other special status which justifies a decision to retain at a cost exceeding replacement cost?
- (4) Is there any precedent for approval or refusal of demolition?
- (5) Is there any record of requests for permission to carry out maintenance or repair work on that cottage?

I hope the above satisfies your requirements. Please don't hesitate to contact me or Kristy Robinson if you require any further assistance with the above.

Yours sincerely



Denis McLeod
Managing Partner

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Peaceful Bay Policy - Submissions closed 30 November 2012

DATE	CORRESPONDENT	ASSESSMENT NO.	REF	INITIAL REPONSE SENT	COMMENT
8/10/2012	Walker	A2442	ICR121015446	16/10/2012	Request for time extension
20/11/2012	Adams	A1888	ICR121116043	30/11/2012	Submission
25/09/2012	Armstrong	A1961	ICR12915112	8/10/2012	Submission
21/11/2012	Brady	A1865	ICR121116032	30/11/2012	Submission
27/09/2012	Buemi	A1965	ICR12915146	8/10/2012	Submission
23/11/2012	Carnaby	A1884	ICR121116083	4/12/2012	Submission
27/09/2012	Cuthbert	A1835	ICR12915175	8/10/2012	Submission
28/11/2012	Day	A2438	ICR121116115	30/11/2012	Submission
20/11/2012	De Landgraftt	A1815	ICR121116087	4/12/2012	Submission
17/09/2012	Eddington	A1957	ICR12915016	26/09/2012	Request for time extension
26/11/2012	Eddington	A1957	ICR121116079	30/11/2012	Submission
25/11/2012	Farmer	A2436	ICR121116114	30/11/2012	Submission
19/11/2012	Fitzpatrick	A1842	ICR121116001	30/11/2012	Submission
22/11/2012	Green	A1839	ICR121116102	30/11/2012	Submission
19/09/2012	Harris	A1940	ICR121015330	8/10/2012	Submission
29/11/2012	Holland & Baxter	A1877	ICR121116176	4/12/2012	Submission
18/11/2012	Jones	A1890	ICR121115988	30/11/2012	Submission
24/11/2012	Jones	A1950	ICR121116112	30/11/2012	Submission
10/09/2012	Kleeman	A1918	ICR12914925	9/10/2012	Submission
23/11/2012	Kleeman	A1918	ICR121116116	30/11/2012	Submission
17/09/2012	Laing	A2400	ICR12915017	26/09/2012	Submission
13/11/2012	Laing	A2400	ICR121115883	7/12/2012	Submission
25/09/2012	Marinoni	A1852	ICR12915111	26/09/2012	Submission
14/09/2012	McFarland	A1861	ICR12914937	26/09/2012	Request for time extension
24/09/2012	McNamara	A1970	ICR12915164	2/10/2012	Submission
30/11/2012	Muir	A1855	ICR121116172	4/12/2012	Submission
25/09/2012	Murray	A1887	ICR12915190	8/10/2012	Submission
30/11/2012	Patmore	A2443	ICR121116171	4/12/2012	Submission
12/09/2012	Peaceful Bay Progress	A2446	ICR12914918	26/09/2012	Submission
14/11/2012	Peaceful Bay Progress	A3104	ICR121115947	10/12/2012	Submission with legal advice
23/11/2012	Reeve	A1858	ICR121116103	30/11/2012	Submission
20/09/2012	Rose	A1939	ICR12915142	8/10/2012	Submission
26/11/2012	Smith	A1814	ICR121116113	30/11/2012	Submission
23/09/2012	Strickland	A2452	ICR12915087	26/09/2012	Submission
19/09/2012	Stubberfield	A1964	ICR12915013	26/09/2012	Request for time extension
29/11/2012	Stubberfield	A1964	ICR121116138	4/12/2012	Submission
26/11/2012	Tapper	A1827	ICR121116085	4/12/2012	Submission
10/12/2012	Tapper	A1827	ICR121216207	10/12/2012	Submission
20/11/2012	Thompson	A1966	ICR121116044	30/11/2012	Submission
3/12/2012	Tognolini	A1848	ICR121116198	5/12/2012	Submission
16/11/2012	Walker	A2442	ICR121115989	30/11/2012	Submission
29/11/2012	Ward	A2454	ICR121116126	4/12/2012	Submission

22 January 2013 - Attachment 8.5.2 c)



20.11.2012

Dear Sir,

I would like on behalf of the householders of the lease of 81 Third Ave Peaceful way to say I object to the taking ownership of our house.

We would also like clarification of said ownership. If the Shire takes ownership will you be responsible for the insurance, rates and repairs? Also gardens etc.

This is unclear to us all. Some of us ~~have~~ have been coming here since 1946.

Yours sincerely
A.M. Adams

ICR121116043

Shire Of Denmark	
A1888	
23 NOV 2012	
EPH	
COUNCILLORS	
CEO	✓
DIR of FINANCE	
DIR of PLANNING	
DIR of INFRASTRUCTURE	
DIR of COMMUNITY	

Claire Thompson

From: Mark & Karyn Armstrong [REDACTED]
Sent: Tuesday, 25 September 2012 11:29 AM
To: Denmark Shire Enquiries
Subject: ICR12915112 - Peaceful Bay

Hi Dale!

I am a leaseholder at Peaceful Bay and have received your letter regarding leaseholders obligations.

I must say what a can of worms it has opened up.

My biggest concern is that I recently paid \$300 000 for "my" Peaceful Bay cottage, which I was under the impression was the "value" of the cottage.

My understanding now is that I was had and that I should of only been sold the lease which I presume wouldn't amount to that price. I want my money back.

Is the Shire going to reimburse me the money I paid for "their" cottage?

When I thought it was my cottage I had intentions of improving it, not now!

I have just paid my shire rates which I didn't mind paying when I thought I owned the cottage, but if I don't own the cottage why should I pay shire rates when I'm only leasing the property, shouldn't I only pay the lease? Is the Shire going to reimburse everyone the rates they have paid over the years?

I understand that it should be up to the Lessee to keep up the general maintenance of the cottage but when it comes to major work like plumbing, roofing, fire alarms, RCDs etc, it should be up to the owner of the cottage(the Shire). Is the Shire willing to maintain the cottages as the "owner"? Who is going to determine what work is needed?

Why would the Lessee want to spend money on a cottage that isn't theirs? Do you think the cottages are going to suffer because of this?

I really think that this can of worms is not going to benefit Peaceful Bay at all.

I look forward to hearing answers to my questions and I hope that they are the right ones.

Yours sincerely,
Karyn Armstrong

21st November 2012

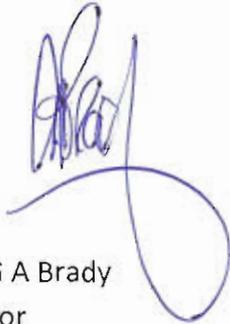
Mr Dale Stewart
Chief Executive Officer
Shire of Denmark
PO Box 183
DENMARK W A 6330

Dear Mr Stewart

We are writing re our concerns raised in your letter dated 28/08/12 about the leases at Peaceful Bay. We are owners of the dwelling on Lot 58, Second Avenue and always believed the land was the property of the Government and was vested in your Shire to manage and that the house and fixtures belonged to us the leaseholders – it seems that this anomaly has occurred when the last lease agreement was negotiated

We would like to request that an amendment could be considered for our current lease.

Thank you for your consideration



G A Brady

For

G A Brady C W Brady & A J Brady



ICR12116032

Shire Of Denmark
A1865

22 NOV 2012

CEO	
COUNCILLORS	
CEO	✓
DIR of FINANCE	
DIR of PLANNING	
DIR of INFRASTRUCTURE	
DIR of COMMUNITY	
TRADER	

Claire Thompson

From: Frank Buemi [REDACTED]
Sent: Thursday, 27 September 2012 9:15 AM
To: Denmark Shire Enquiries
Subject: ICR12915146 - Peaceful Bay Lease Issue

REF: DS/CT File A3104 & A1965

I have read with interest, the correspondence received and appreciate Council giving Leaseholders the opportunity to express their views on this sensitive matter

My family and I have been Leaseholders for over 40 years and under previous lease arrangements we understood our obligation to clear the "land " at the expiration of our lease if we no longer wished to continue with the lease

In regard to Council Resolution No. 070812, I believe that this is not in keeping with the spirit in which these leases were entered into over 40 years ago, is not on commercial terms and nor is it in the best interests of Leaseholders to maintain or improve any building or structure erected on the leased premises

Additionally, this resolution could impose a burden on Leaseholders who wish to sell or transfer their leases

It appears to me that the Shire of Denmark Town Planning Scheme has not taken into consideration lease previously entered into and other Planning Policy that the Council has endorsed over many past years. Leaseholders in Peaceful Bay cannot be disadvantaged or held responsible for substandard Planning decisions made by Council over the past years

A solution maybe for Council to amend their Town Planning Scheme and /or the Peaceful Bay Heritage Precinct Conservation Planning Policy to exclude Peaceful Bay Leasehold dwellings and thus maintain fair market value of properties in the Bay and protect the substantial revenue generated for the Council from this Zoning by encouraging Leaseholders to maintain and have pride on dwellings erected on this leased land

Many Thanks
Francesco Buemi

Claire Thompson

From: Lyn Cuthbert [REDACTED]
Sent: Thursday, 27 September 2012 5:00 PM
To: Denmark Shire Enquiries
Subject: ICR12915175 - FW: Leaseholder - Lot 28 Peaceful Bay

[REDACTED]

Sent: Thursday, 27 September 2012 4:27 PM
To: 'cr.thornton@denmark.wa.gov.au'
Subject: Leaseholder - Lot 28 Peaceful Bay

Attention to:
The Shire President of Denmark,
Mr Ross Thornton

Dear Sir

As the Leaseholder of Lot 28 Peaceful Bay we have objections as to the intentions of the Shire to claim ownership of all buildings within the Peaceful Bay Leasehold area.

I had a telephone conversation with Mr Dale Stewart regarding the Peaceful Bay, Lease holdings in which he stated:
"That the Shire of Denmark was only the Management Body of the Crown Land Locations 1423, 1424 and 2229 which is the property of the Western Australian Government overseen by the Minister for Lands."

Resolution No 070812 states that any improvements to the Leasehold Property the Lessee must provide written confirmation that the property remains the property of the Shire at the end of the Lease. How can the Management Body (Shire) claim ownership of any property? Under 14.02 Lessees obligation to remove fittings i.e. fixtures and fittings and improvements which are erected or installed on the land, belong to the Lessees must be removed when the Lease expires.

I stated to Dale Stewart that I am a Vietnam Veteran on a full T.P.I War Pension. As part owner of Lot 28 Peaceful Bay, it is a very large part of our future security. My pension is means tested, with the cottage and fittings valued at \$240,000. Dale Stewart comment was "Oh well your pension would increase without ownership." Dale Stewart further commented that the Shire already had the power to foreclose on any Lease and or not renew the Lease at the completion of this period.

I was lead to believe that the Shire was the Management Body who represents the Rate Payers of Peaceful Bay when dealing with the Minister for Lands regarding the Lease of Crown Land.

Yours faithfully

Colin Cuthbert
[REDACTED]

Shire of Denmark

28 NOV 20
ICR121116



A3104/1950 24-11-12

COUNCILLORS	
CEO	✓
SIR of FINANCE	
SIR of PLANNING	
SIR of INFRASTRUCTURE	
OTHER	

Mr Dale Stewart
Chief Executive Officer
Shire of Denmark
PO Box 183 Denmark WA 6333

Reference Lot 143 4th Ave Peaceful Bay.

Dear Sir,

We received a letter from your office regarding our current lease.

In the past the lease agreement, as we understood, only covered the leased land, owned by the government and vested in the Shire of Denmark, while the buildings fixtures and fittings remained our own personal property. In providing we followed the conditions set out in the said lease.

We would like to request that an amendment could be negotiated for our current lease.

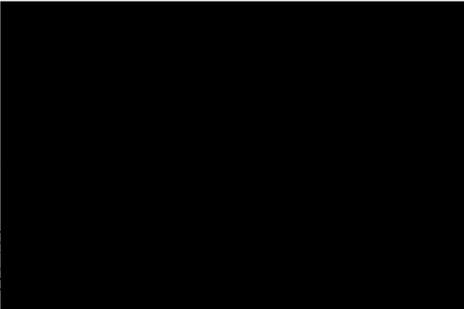
Thank you for your service and consideration.

Yours faithfully.

DL & AI Jones

DL & AI JONES.

Shire Of Denmark	
28 NOV 2012 1CR121116115	
EPH	
A3104/2438	
COUNCIL LORS	
CEO	<input checked="" type="checkbox"/>
DIR of FINANCE	
DIR of PLANNING	
DIR of INFRASTRUCTURE	
DIR of COMMUNITY	
OTHER	



The Chief Executive Officer
Shire of Denmark

Dear Sir

Re Peaceful Bay Leasehold Property – lease amendments

My wife and I are the joint leaseholders of Lot 183 Fifth Avenue, Peaceful Bay.

This letter is written as our submission in response to the recent discussions between leaseholders, Peaceful Bay Progress Association and the Shire of Denmark. We have been reassured by the transparent and proactive communication on this subject by the Shire of Denmark.

As with most/all other leaseholders of Peaceful Bay properties, the advice conveyed in the letter dated August 12th 2012 from the Shire of Denmark, relating to recently received legal advice concerning leaseholders obligations, represented a potentially devastating adverse change in our entire financial situation.

We purchased the lease of Lot 183 Fifth Avenue in 1991 in anticipation of imminent retirement, in clear belief, based on apparent common practice amongst other leaseholders there, that purchase would provide not only a modest holiday cottage but more importantly, had potential to become a significant component of our retirement assets.

We are now both fully retired age pensioners, in receipt of a part pension through Centrelink. The Peaceful Bay property is, and always has been, determined by Centrelink to represent a significant asset and the amount of our age pension reduced accordingly. We have co-incidentally just received advice from Centrelink that they are about to conduct another ‘Real Estate Asset Review’ of the property as a basis of redetermination of our age pension payment entitlement. Based on past such reviews an asset value increase and further reduction of our pensions looms seems highprobable!! We trust therefore the lease amendment negotiations will be expedited and result in a positive outcome for leaseholders.

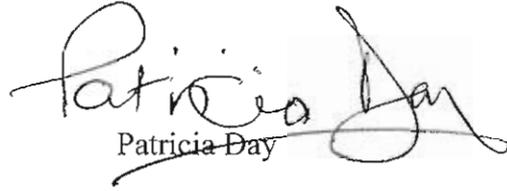
Accordingly, we wish to place on record our total support for the current proposal, developed between the Peaceful Bay Progress Association and the Shire of Denmark, to have each leaseholders lease wording amended to acknowledge that the cottages are the leaseholder’s property. Also that assessments of the lease fee will be based upon the lease of the land and not of the land plus owner’s infrastructure (buildings, tanks etc).

The extension of the time frame for submissions by leaseholders in relation to the lease amendment issue is appreciated.

Yours faithfully

A handwritten signature in black ink, appearing to read 'John Day', with a large, sweeping initial 'J' and a horizontal line across the bottom.

JohnDay

A handwritten signature in black ink, appearing to read 'Patricia Day', with a large, cursive 'P' and 'D' and a horizontal line across the bottom.

Patricia Day

20, Nov. 2012

The Secretary
Denmark Shire Council.
Denmark

Dear Sir,

I wish to express my great concern over the new development of my lease arrangements at No 8, FIRST AVENUE, PERCEFUL BAY. My father Lewis Luckell took up this lease + I built the cottage on it in the mid. 1950s. Since then it has always been our understanding that although we only leased the land, the cottage + outbuilding belonged to us. If the lease expired we were responsible for its removal + clean up of the land. I therefore find it unexpected to have this agreement altered after over fifty years.

So I'm writing to you Denmark Shire seeking a amendment of each lease in this regard Particulary that any assessment on rent. (Lease fee) will be on the basis on land only without taking into account the cottage, 'as always' has been.

Yours faithfully
(Peg) W.M. (WINIFRED MURIER) De Landgraff
(LEASE HOLDER)

JCA-1211608

Shire Of Denmark
A3104/A1815

26 NOV 2012
XPROF OCR12811608

EPH	
COUNCILLORS	
CEO	✓
DIR of FINANCE	
DIR of PLANNING	
DIR of INFRASTRUCTURE	
DIR of COMMUNITY	
OTHER	



Mr Gregg Harwood,
Director of Community and Regulatory Services
Shire of Denmark
953 South Coast Highway
Denmark 6333

Dear Mr. Harwood

We are writing to express our serious concerns regarding the resolution #070812 that was sent to us to review as lease holders at Peaceful Bay.

We ask that the council give an extension to the date required for a response to this issue, along the lines that the Peaceful Bay Progress Association has preposed. That is until the 30th November 2012 This will give us the time to seek legal advice about the consequences and the proposed intent of the resolutions.

Yours sincerely,

Robert & Kathleen Eddington

17th September,2012



Dale Stewart,
Chief Executive Officer,
Shire of Denmark
PO Box 183
Denmark 6333

RE: RESOLUTION #070812

We would like to express our concerns regarding the above resolution which will have serious implications to us as leaseholders.

We have at all times adhered to the terms of our lease and now find that our tenure is under threat with the resolution that is currently before council. To imply that the Denmark Shire can at any time take control of our property without any consideration of our ownership and the improvements that we have carried out on the leasehold appears to us to be an attempt by council to acquire our property that we have bought and paid for.

We hope that this is not the case and that the council is prepared to listen to the lease holders to try and over come any misunderstandings regarding the leaseholders obligations and the obligations of the council under the terms of our lease.

To this end might we suggest that the council considers an amendment or an addendum to the existing lease that was negotiated, in good faith by all concerned, in 2010 that reflects the intent that the leaseholders own the infrastructure as per the agreed principles of the existing lease.

Yours sincerely

Robert & Kathleen Eddington

22nd November, 2012

Monday, November 19, 2012

Mr Dale Stewart
Chief Executive Officer
Shire of Denmark
PO BOX 183
Denmark 6333

RE: Lease Ownership at Peaceful Bay.

Dear Dale,

In my **view**, this seems a case where legal interpretation has created concern and stress clouding the original intent of an agreement.

In layman's terms, it would seem the simplest way to resolve the grey area is to make an amendment to the leases acknowledging the cottages and adjoining structures are the property of the tenant.

I would have thought the Shire of Denmark reserve the right to have some control over the quality and nature of any renovation or replacement of an existing cottage so the structures are reasonably sound and fit in with the character of the community.

I would have also thought that it prudent to make any renovations / replacements etc subject to setbacks moving forward in the event the land is strata titled or made freehold sometime in the future. Or at least, the tenant acknowledges that they may have to pull down something that doesn't comply in the future.

The above should give both the Shire of Denmark and tenant's peace of mind and control and return the interpretation of the agreement back to where I believe the original intent lay.

Kind Regards

Tony Fitzpatrick
for Lot 35 Second Avenue, Peaceful Bay

Shire of Denmark	
FOR 121116001	
21 NOV 2012	
A3104/1842	
COOPERATIVE	
CEO	<input checked="" type="checkbox"/>
PROPERTY	
DEV	
DIR OF COMMUNITY	
OTHER	



22-11-2012

Chief Executive Officer
Shire of Denmark.

Dear Sir,

Reference to ownership of cottages
in the lease hold area at Peaceful Bay.

I have always believed I am the owner
of the cottage being, Thirtytwo in second avenue.

I can not see anything in the
present lease referring to the Shire owning
the cottages.

Yours Truly,
Ivan Jeev.

1CR12116102

Shire Of Denmark

A3104/A1839

27 NOV 2012

REF: OCE-12814608

COUNCILLORS	
CEO	✓
DIR OF FINANCE	
DIR OF PLANNING	
DIR OF INFRASTRUCTURE	
DIR OF COMMUNITY	
OTHER	EA ✓

Shire of Denmark	
ICR12101532	
- 4 OCT 2012	
A19440	
File:	
XREF OCR12314608	
COUNCILLORS	
CEO	
DIR of FINANCE	
DIR of PLANNING	
DIR of INFRASTRUCTURE	
DIR of COMMUNITY	
OTHER	

19th September

The Chief Executive Officer
 Shire of Denmark
 Southwest Highway
 Denmark WA 6333

Reference; Demolition of a cottage at Peaceful Bay

Dear Sir

I am writing to you regarding your letter about a request to demolish a cottage at Peaceful Bay and replacing it with another dwelling. I find the whole submission very disappointing in so much as the Shire has failed in it's duty to enforce the terms of the "Lease" and the lessee has also failed to keep the existing dwelling in accordance with the contents of the lease. However, we should not dwell on "spilt milk" or join the "if only" club. These facts should be recorded in case of any future legal actions and with this in mind I would like to ask for an extension of time to enable the Peaceful Progress Association to obtain legal advice, much the same as the Shire has done.

My answer to your question about the demolition and replacement is that the owner should be granted permission to demolish those parts of the existing which are deemed unsafe and these parts replaced with new additions, however these should be kept as close as possible to the format of the existing dwelling. Many presidents have been set in the past regarding this matter which are but not limited to;

Bees Knees,
 The dwelling opposite Bees Knees,
 The one opposite the dwelling on lot 132.
 These dwellings have been renovated and the renovations have been kept within or as close to the terms as laid down in the lease.

With regard to the proposed amendments to the existing lease, you were 100% spot on about this being a controversial point. The lessees I have spoken with have all agreed that this is a property grab attempt by the Shire and I am not happy with this. As a layman I am easily confused by legalese and am so with the Shire's new proposal. Would you please clear up a few points for me?

- If the Shire manages the leasehold area of Peaceful Bay, how can they take ownership a dwelling set upon land the Shire doesn't own?
- Because the Shire is now claiming ownership of the dwellings on the leased lots, wouldn't the Shire be responsible for the maintenance and upkeep of the dwellings?

- Because the Shire is now claiming ownership of these dwellings, wouldn't the Shire be responsible for the insurance of the dwellings?
- Because the Shire is now claiming ownership of the dwellings, wouldn't they responsible for the payment of rates?

The last three dot points are conditions are in place with any rented property within the property rental marketplace that I know of.

If the Shire is not making a property grab it should demonstrate this, one way to do this would be for the Shire to extend the period of the leases for say another 20 years. This would certainly balance any changes to the existing leases and provide a win/win situation for all parties concerned.

Thank you for the opportunity to express our views on these matters.

Yours age

Paul St

LOT 133

FOURTH AVENUE

PEACEFUL BAY

Emma Holland and Callum Baxter



ICR121116170

Shire Of Denmark
A3104/A1877

29 NOV 2012
XREF OCE12814608

COUNCILLORS	
CEO	✓
DIR of FINANCE	
DIR of PLANNING	
DIR of INFRASTRUCTURE	
DIR of COMMUNITY	
OTHER	EM

29th November 2012

Chief Executive Officer
Shire of Denmark
PO Box 183
Denmark WA 6333

RE: Peaceful Bay Reserve 24510 – Legal Advice Concerning Leaseholders Obligations

Dear Dale

Thank you for your letter dated 28th August regarding legal advice from McLeods Barristers and Solicitors, and Councils consideration of the matter (your reference DS/CT File A3104 and A1877).

We are writing to you as current leaseholders of Lot 70 Second Avenue Peaceful Bay to express our concerns regarding the content of the letter referred to above and to the proposed Council Policy.

We are shocked at your comments ‘that the buildings ... are essentially the property of Council’ as stated on page 2 of the letter. This has not been the case as implied in the wording of historical leases and we see no reason it should suddenly change now.

Also, we do not agree with subsequent proposed Council Policy that states that “Prior to obtaining the approval of the owner (the Council as lessor), to proposed significant improvements to a Peaceful Bay Holiday Cottage leasehold property and/or the construction of a new dwelling on that leasehold property, the lessee must provide written confirmation that they agree that the improvements / new building proposed to be the subject of a planning consent application, remains the property of the Shire at the end of the lease.” (resolution No. 070812).

And, we do not agree that Council undertake annual inspections of the leasehold properties (resolution No. 080812).

Speaking with many other leaseholders on these matters we have found much opposition to the Shire of Denmark assuming ownership of the cottages and further opposition to the proposed Council Policy. The suggestion that the Shire will assume ownership of the cottages has caused distress and anxiety to many members of our community, in particular the older retirees many of whom have limited financial capacity.

To clarify the matter we seek an urgent amendment to our lease agreement, and all other lease agreements in the community of Peaceful Bay, that states that the Shire acknowledges that the cottages are the property of the tenant.

Yours Sincerely

Emma Holland and Callum Baxter

IOR 12 1115988

Shire of Denmark	
A 1890	
20 NOV 2012	
EPH	
COUNCILLORS	
CEO	✓
DIR of FINANCE	
DIR of PLANNING	
DIR of INFR.	
DIR of COMM.	
OTHER	

Brian & Mavis Jones



18th November, 2012

Dale Stewart
 Chief Executive Officer
 Shire of Denmark
 PO Box 183
 Denmark WA 6333

Dear Dale

Re: Peaceful Bay Leasehold

In response to the letter received from the Shire of Denmark we wish to make the following comments.

Regarding Resolution No. 040812 – We have no issues with this resolution as we have always maintained our premises for our own safety and comfort.

Regarding Resolution No. 050812 – We have no issues with this resolution although we would comment that the Peaceful Bay Heritage Precinct Conservation Planning Policy appears to conflict with clause 14.2 of the current lease (see below).

Regarding Resolution No. 080812 – We have no issues with this resolution and consider this sound and reasonable.

Regarding Resolution No. 070812 – Intended new Council Policy indicates that as a condition of approval for improvements/new building lessees must provide written confirmation that the improvements/new building remain the property of the Shire and the end of the lease. I am appalled that Council would implement such a policy which requires the lessee to relinquish ownership of the cottage they have built/improved/purchased to the Council.

When we acquired our leasehold site in 1978, the existing building was a rough 20 x14 shed, unlined and needed a lot of work to make it habitable. Over the ensuing 34 years we have worked hard and now have a 3 bedroom cottage with kitchen/living area, shower and toilet facilities with excellent plumbing and electrical installation. We are proud of what we have achieved as a family and enjoy spending a lot of time at Peaceful Bay. Over the years we have complied with all requirements of the Shire of Denmark and now feel deeply concerned that the ‘ownership’ of our cottage is being debated. We signed each lease on the premise that we were leasing the “land only” and the ownership of the cottage was never in question.

In clause 14 – Determination of Term.

14.2: Lessee's Obligation to Remove

The Lessee shall within FOURTEEN (14) days after the expiration of the Term or immediately prior thereto remove from the Demised Premises all the Lessee's fixtures and fitting and improvements which are erected or installed on the Demised Premises unless consent for such fixture fittings or improvements to remain on the Demised Premises of obtained from the Lessor and the Lessee shall make good to the satisfaction of the Lessor all damage caused to the Demised premises by removal.

The above indicates to us that we do have ownership of the cottage. We do not consider our cottage a fixture as it is on stumps and can be removed so it does not 'become part of the land'.

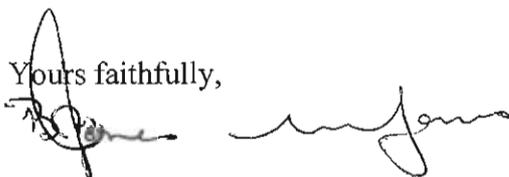
This clause appears to be in conflict with the Peaceful Bay Heritage Precinct Conservation Plan and the issue was highlighted when a leaseholder applied to demolish his existing cottage. Maybe the PBHPCP should be removed and replaced with a restricted building covenant to protect the intrinsic nature of the Peaceful Bay village.

The Peaceful Bay leasehold village is unique and has been held up as a model for the inquiry into shack sites in WA. during which "ownership" was never as issue.

We understand these are complex issues and the Shire of Denmark is being transparent and open and it was never the intention of the Shire of Denmark to seek ownership of the cottages. It is recognised that the Shire of Denmark is the Lessor and, therefore, is "owner" of the leased sites and normal building approvals by the local authority apply. Ownership of the buildings will have ramifications if Council decides to freehold the lease sites in the future and does need to be resolved. Legal advice obtained regarding Landlord's ownership of the buildings appears to be based on the Landlords and Tenants Act, however, the Council has the discretionary power not to pursue this.

So, to confirm the Shire of Denmark's intention not to seek ownership of the cottages, we feel that in all fairness the Council should acknowledge in writing that the Lessees do own their cottages situated on lease sites in the Peaceful Bay village and this acknowledgement should also be made an addendum to the current Lease.

We hope our comments on the Resolutions will be of value and assistance to Council during discussions and the outcome will benefit all parties.

Yours faithfully,


Brian and Mavis Jones

Shire Of Denmark	
ICR 12914925	
12 SEP 2012	
OCT 28 14608	
A3104/A1918	
COUNCIL LEAS	<input checked="" type="checkbox"/>
CEO	<input type="checkbox"/>
DIR of FINANCE	<input type="checkbox"/>
DIR of PLANNING	<input type="checkbox"/>
DIR of INFRASTRUCTURE	<input type="checkbox"/>
DIR of COMMUNITY	<input type="checkbox"/>
OTHER	<input type="checkbox"/>


10th September 2012

X/Ref

Shire of Denmark
PO Box 183
DENMARK WA

Ref: DS/CT File A3104 & A1918

Attention Dale Stewart

Dear Sir

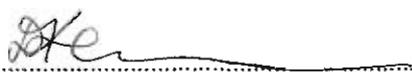
I was in contact with your office last week and am not satisfied with this proposal and I would like to put a question to you which does concern me and others –

“When the current leases expire at the end of their twenty one year contract, and the Council did proceed with this proposal, referring to the above, would it give the Shire of Denmark the power to –

Not renew the lease, take ownership and either offer it back to the current owners at a price or resell on the open market?

This is a “Yes or No” question.”

Thank you for your attention to the above and I await your reply


D.C. Kleemann

Claire Thompson

From: Ken Laing [REDACTED]
Sent: Monday, 17 September 2012 1:24 PM
To: Denmark Shire Enquiries
Subject: ICR12915017 - Leasehold Obligations
Attachments: "AVG certification".txt

Chief Executive Officer

Shire of Denmark

17 September 2012

Attention Mr. Dale Stewart

Re: DS/CT File A3104 & A2400 – Leaseholder Obligations

Dear Sir,

We acknowledge receipt of your letter dated 28 August 2012, received by us on 12 September 2012. We advise that you have not given us sufficient time to properly examine the issues raised by you and your legal advice and therefore request that the time for our submission be extended. It appears that it has taken approximately 13 months for legal advice to be prepared and therefore it would seem appropriate that a similar time be allowed for responses. We understand that your legal advisors may not have been as prompt in replying to your enquiry as would be normally expected for such a simple matter and therefore request only a two month extension.

From a brief examination of the advice given to you we would at this time make the following comments:

- 1) Fifth Avenue is not listed as a place of heritage value and therefore any requirements of that listing do not apply to our lease and your legal advice in that respect is incorrect.
- 2) The original invitation to tender for the lease was for a lot of land on which we were required to erect a holiday cottage within two years of the beginning of the lease. Our tender for that lot was accepted unreservedly by council in their letter dated 1 March 1990. A condition of that tender was that the lease was renewable at the end of the 21 years. At the time of the tender that was a reasonable assumption as Council had previously renewed leases in the other part of the Bay. In fact the Council has always stated that they were in favour of renewing the leases.
- 3) The invitation to tender for the lots in Fifth Avenue required that the Holiday cottage and other improvements be removed and the land made good if the lease was not renewed or if we terminated the lease. Our house has been constructed so that it can be moved and placed elsewhere if that situation arises (a step that we do not want to take) and we therefore do not accept that the buildings are intrinsically attached to the site. They are not the property of Council. If the Council wishes to acquire the house and improvements we suggest that it makes an offer to purchase those items.
- 4) The lease requires us to insure in our name to cover the Lessee's fixtures, fittings and improvements. Clearly this clarifies that the house and improvements are ours, not Council's.

In respect to the request to demolish and rebuild the cottage from our perspective we believe that if one of the houses has been allowed to deteriorate to the extent that it is cheaper to demolish it and rebuild then surely the reasonable approach is to allow that to occur with the new construction being carried out so that it is compatible with the other cottages in the listed area but complying with current building regulations. That surely is a win for all parties.

Yours faithfully

D.K. & L.A.LAING

Dale Stewart

From: Ken Laing [REDACTED]
Sent: Tuesday, 13 November 2012 8:26 AM
To: Denmark Shire Enquiries
Subject: ICR121115883 - leasehold legal advice - Peaceful Bay

Chief Executive Officer,
Shire of Denmark

Attention Mr. Dale Stewart

Re: DS/CT File A3104 & A2400 – Leaseholder Obligations

Dear Sir,

Further to my letter dated 17 September 2012 I wish to register my disagreement with resolution No. 070812 as it is contrary to the conditions of the lease.

The lease clauses 1.07 & Item 6 of the schedule clearly states that any structure, building or other fixture or fitting ~~in or upon the leased premises~~ are the property of the Lessee. Clause 6.01 stipulates the requirements for alterations to be made to the premises and that does not require the Lessee to give the improvement to the Council.

If the council persists with resolution No. 070812 it will contravene the lease conditions for that particular property and that I believe would constitute a default of the Lessor.

In respect to resolution No. 050812 the properties in Fifth Avenue are not within the Heritage Precinct and therefore the resolution should recognise this and a clause to that effect should be added. That of course means that the solicitor's advice does not apply to those properties.

Yours faithfully

D.K.LAING & L.A. LAING

Claire Thompson

From: Phil & Vi Marinoni [REDACTED]
Sent: Tuesday, 25 September 2012 10:14 PM
To: Denmark Shire Enquiries
Subject: ICR12915111 - peaceful bay

Mr Dale Stewart
CEO
Shire of Denmark

Dear Mr Stewart

Re your correspondence of 28th August 2012 concerning Peaceful Bay leaseholds - There are aspects of your document which cause us concern and which we feel need further investigation and clarification.

In view of this we wish to request that you extend the closing date for submissions to the 30th November 2012

Yours faithfully,

Phill and Vi Marinoni
[REDACTED]

Claire Thompson

From: Alan McFarland [REDACTED]
Sent: Friday, 14 September 2012 10:42 AM
To: Claire Thompson
Cc: Ian McFarland
Subject: ICR12914937 - Peaceful Bay leaseholder obligations. Your ref: DS/CT File A3104 & A1861
Attachments: "AVG certification".txt

Claire,
I have read the information provided and I can see it is a very complex issue. I personally don't believe the 30th of September is long enough to get the information I need in regard to this.

Could I ask that the Shire of Denmark extend the time allowed to make submissions on this.

I understand the Peaceful Bay Progress Association have requested an extension to the 30th of November 2012.

This to me seems ample, so I would respectfully ask the same.

Regards,

Alan McFarland

From: Claire Thompson [<mailto:ea@denmark.wa.gov.au>]
Sent: Monday, 10 September 2012 8:26 AM
To: Alan McFarland
Subject: FW: July 2012 information bulletin

Dear Mr McFarland

In response to your email below I have attached a copy of the letter sent to all Peaceful Bay Leaseholders, posted on the 29 August 2012, together with the associated attachment. A similar letter was also sent to the Peaceful Bay Progress Association.

Should you require any further information relating to this email please do not hesitate to contact me.

Regards

Claire Thompson

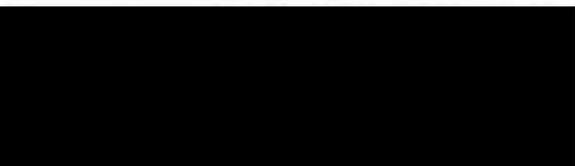
Executive Assistant
Shire of Denmark
PO Box 183
Denmark WA 6333

Phone: (08) 9848 0300
Fax: (08) 9848 1985
Email: ea@denmark.wa.gov.au
website: www.denmark.wa.gov.au

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From: Alan McFarland [redacted]
Sent: Friday, 7 September 2012 3:57 PM
To: Denmark Shire Enquiries
Subject: July 2012 information bulletin

I would like to source more information in regard to some matters mentioned on your July information bulletin. In particular Resolutions 050812 and 070812 where it states:

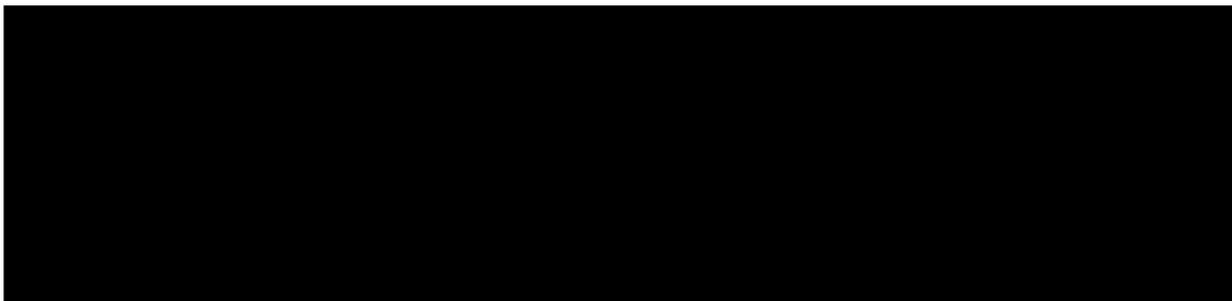
“That Council with respect to the leasehold properties at Peaceful Bay advise the Peaceful Bay Progress Association Inc. and lessees that it intends to create a new Council Policy that states that “Prior to obtaining the approval of the owner (the Council as lessor), to proposed significant improvements to a Peaceful Bay Holiday Cottage leasehold property and/or the construction of a new dwelling on that leasehold property, the lessee must provide written confirmation that they agree that the improvements / new building proposed to be the subject of a planning consent application, remains the property of the Shire at the end of the lease.” and seek comment from interested persons to the proposed policy, closing on the 30 September 2012.”

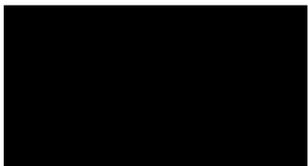
As I am the representative of McFarland Nominees, one of the leaseholders at Peaceful Bay, no such letter has yet been received by us in regard to this.

Could further information please be supplied to the below address?

Regards,

Alan McFarland





Mr Gregg Harwood,
 Director of Community and Regulatory Services
 Shire of Denmark
 953 South Coast Highway
 Denmark 6333

Dear Mr. Harwood

We want to express our serious concerns regarding the resolution #070812 that was sent to us to review as lease holders at Peaceful Bay.

We would like an extension to the date required for a response to this issue, along the lines that the Peaceful Bay Progress Association has preposed. That is until the 30th November 2012. This will give us the time to seek legal advice about the consequences and the proposed intent of the resolutions.

Yours sincerely,

J. McNamara
M. McNamara

Jim & Lorraine McNamara

24th September, 2012

X REF: OCR12814608

Shire Of Denmark	
A1970	
27 SEP 2012	
OCR 12915164	
COUNCILLORS	
GEO	✓
DIR of FINANCE	
DIR of PLANNING	
DIR of INFRASTRUCTURE	
DIR of COMMUNITY	✗
DIR	

ICR12915790

Shire of Denmark
A1887

28 SEP 2012

COUNCILLORS	
CEO	
DIR of FINANCE	
DIR of PLANNING	
DIR of INFRASTRUCTURE	
DIR of COMMUNITY	
OTHER	



25 September 2012

Mr Dale Stewart
 Chief Executive Officer
 The Shire of Denmark
 South Coast Highway
 Denmark WA 6333

Dear Mr Stewart

Peaceful Bay Leases: Legal Advice Concerning Leaseholder Obligations:

Request for Extension of Time to Consider issues and Lodge a Submission

We refer to your letter dated 28 August, 2012, informing us of the advice obtained recently by the Shire of Denmark about the obligations of leaseholders of properties at Peaceful Bay.

We have leased lot 80 Third Avenue, Peaceful Bay since 1988. Having access to the property has provided our family and many of our friends with many special opportunities to experience the delights of the South Coast region. In particular, we have especially enjoyed sharing them with the thousands of other people who holiday and live there, or earn their livelihoods from supplying us with services.

The legal advice provided to the Shire attempts to deal with many very complex issues as it tries to explain the relationship between the Shire and the leaseholders. There are important matters that the advice does not adequately address and issues pertaining to entitlements and interests of the large community of leaseholders at Peaceful Bay that appear to be receiving little attention.

It is very important that a reasonable, enduring relationship between the Lessor and the lessees is achieved as soon as is practicable. In order to achieve this outcome, we believe that the parties need to work together in rational ways to acquire the information and mutual understanding that would make this possible.

It is important that discussion of the matters occurs both among leaseholders as well as between leaseholders and the Shire.

It is also important to recognise that most leaseholders do not reside permanently at Peaceful Bay and are not likely to all be able to visit the Bay at any one time.

In the past, a practice that has worked successfully in dealing with similar, major, local issues has been based on providing opportunities for discussion of the matter over a reasonable period when the largest possible number of leaseholders may be available to participate in the discussions. The discussions could be led by responsible community leaders, informed by appropriate Shire representatives and other experts and possibly facilitated by persons with relevant expertise.

As the Summer School Holiday period is a time when many leaseholders are likely to visit Peaceful Bay, it could provide the core period for discussion of the matter. If possible, a greater level of participation might be achieved by extending the discussion events to include the Easter break in 2013.

We believe that like ourselves, many other leaseholders will wish to take part in discussions with other leaseholders and with the Shire about the matters raised. We also believe that until we have had the benefit of participating in such discussions, we could not adequately provide an adequate submission in response to the Shire's letter.

Accordingly, we request that extensions of time for the lodgement of submissions be granted to leaseholders until the expiry of a reasonable period during which the Shire, in cooperation with the Peaceful Bay Progress Association arranges suitable leaseholder discussion events along the lines outlined above.

We would appreciate learning of your decision about our request in the near future and look forward to providing a constructive submission and/or contributions to one, or more of the discussion events.

Yours faithfully

The image shows two handwritten signatures in black ink. The signature on the left is 'Denise Murray' and the signature on the right is 'Malcolm Murray'. Both are written in a cursive, flowing style.

Denise and Malcolm Murray

PEACEFUL BAY PROGRESS ASSOCIATION INC

Peaceful Bay WA 6333

ABN: 54389092839



12 September 2012

Shire of Denmark
PO Box 183
Denmark WA 6333

ATTN: Dale Stewart – Chief Executive Officer

Dear Sir

RE: Legal Advice Concerning Leaseholders Obligation
Your ref: DS/CT File A3104&A2446

Thank you for your letter dated 28 August 2012 and the attached legal advice from McLeods Solicitors and Barristers.

As you have stated in your letter that these resolutions ‘may be controversial’ and that the complexity of these issues requires legal advice in these items to be resolved, this is also relevant to the Peaceful Bay Progress Association.

To this end, the Peaceful Bay Progress Association met on 10 September 2012 and a motion was passed that the Association engage a solicitor to examine and report back to the Association on their interpretation of legal advice received by Denmark Shire Council from McLeods Solicitors and Barristers and the subsequent interpretation and intentions of the Shire regarding the future of leasehold properties in Peaceful Bay.

The signatory to the letter from McLeods Solicitors and Barristers, Mr Denis McLeod, recognised the complexity of the issues raised and apologised for the lengthy delay in providing you with their advice.

The Peaceful Bay Progress Association along with all leaseholders have been given less than a month to provide written comments to your office and in light of the above the Peaceful Bay Progress Association request the deadline for submissions be extended to 30 November 2012.

Yours sincerely

Don Hodgetts
President

Cc: Gregg Harwood – Director of Community and Regulatory Services, and Councillors

PEACEFUL BAY PROGRESS ASSOCIATION INC

Peaceful Bay WA 6333

ABN: 54389092839

www.peacefulbayprogress.org.au



1CR121115947

A3104

Dale Stewart
Chief Executive Officer
Shire of Denmark
PO Box 183
Denmark WA 6333

Dear Dale,

Re: Peaceful Bay Reserve 24510 – Lease and Ownership of Cottages

Following the advice contained in the letter from Talbot Olivier, I am writing on behalf of the Peaceful Bay Progress Association requesting that the Denmark Shire Council acknowledge that the cottages are the tenant's property and seeking an amendment to each lease in this regard, particularly that any assessment of rent will be on the basis of the land only (without taking into account the cottage). As part of this request, the history of the cottages ought to be explained to the current council of the Shire.

Attached is a copy of the letter received from Talbot Olivier for the information of yourself and the Councillors. Our Association is hopeful of an amicable outcome to resolve this issue which is a cause of concern for the leasehold membership.

Yours faithfully,

Mavis Jones
Secretary

14 November, 2012

cc: to all Councillors

Talbot Olivier

L A W Y E R S

Our ref: AC:SZD:46799
Contact: Sascha de Lacy-Koenig
Direct line: 9420 7170
Direct email: sdelacykoenig@talbotolivier.com.au
Principal: Anton Conti

15 October 2012

Mr J Burkett and Ms Janine Phillips
C/- 191 Fifth Avenue
PEACEFUL BAY WA 6333

By Post

Dear Janine

Advice on Lease and Ownership of Cottages – Peaceful Bay Reserve 24510

Thank you for your instructions to review the following:

- sample copy of the lease agreement in respect of Peaceful Bay Reserve 24510 (**the reserve**) on Land Administration Statutory Services Plan 20017 commencing 1 July 2010 and expiring 30 June 2031 (**current lease**); and
- copy of a previous lease agreement in respect of Lot 191 of Peaceful Bay Reserve 24510 commencing 1 July 1991 and expiring 30 June 2010 (**previous lease**),

and to advise you whether the cottages on various lots within Reserve 24510 (**the cottages**) are owned by the tenant of such lot or owned by the Shire of Denmark (**the Shire**)

We advise as follows:

Terms of the Current Lease and Previous Lease

The Current Lease contains provisions that support an argument that the cottages are the property of the tenants. These are:

- the Definition of Demised Premise referring to “that part of the Land” (without mentioning improvements or buildings) and referring to it being a “Site”. Usually when a building is included in Premises reference is made to it;
- clause 5.02 where it provides that the tenant is to “maintain the Demised Premises and all improvements placed thereon” (our emphasis). The argument being that if the Demised Premises contained the improvements there should be no need for the drafters of the lease to have included “and all improvements placed thereon”; and



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Email: talbots@talbotolivier.com.au
www.talbotolivier.com.au
Talbot Olivier Pty Ltd
ACN 126 990 949

H84226v1.

- clause 14.02 where it provides that the tenant is to remove all fixtures and fittings and improvements within 14 days of the expiration of the term, but only those erected or installed by the tenant (clause 14.02). This clause suggests that under the current lease any fixtures, fittings and improvements constructed by the tenant during the term of the lease are the property of the tenant.

Please note that both the current lease and the previous lease are silent on the position in relation to improvements made by a previous tenant. The inference being that the current tenant may not be permitted to remove improvements made by a previous tenant or any improvements made by the landlord.

Notwithstanding this, the law generally takes the view that, without very clear terms in a lease to the contrary, the 'land' includes any fixtures (including buildings). Even though both the current lease and the previous lease contain the right to remove the cottages, this does not affect who is deemed to be the owner of the cottages. If the cottages are deemed to be fixtures, at law, they are the property of the landowner even though the tenants have the right to remove them.

Is the cottage a fixture?

To determine whether the cottages are fixtures the courts have regard to a number of factors. These include:

- the degree of annexation to the land, that is, how well it is fixed to the land;
- whether removal will cause substantial damage. If so, a fixture will be the more reasonable conclusion; and
- whether the apparent intention was for something to be secured for a long or short time.

Please note that it is not a determining factor as to who has paid for the cost of the fixture.

If an item is affixed to land to any extent (other than merely resting by its own weight), it is presumed to be a fixture.

The Peaceful Bay Heritage Precinct Conservation Plan at pages 48 and 49 provides the following information about the cottages:

- most have a small footprint in proportion to the blocks;
- simple in form;
- some were relocated from the mill towns around Shannon; and
- most were constructed with a timber frame and lightweight cladding.

We consider, having regard to the information provided to us, including the photographs of the cottages and the description of the cottages in McLeod's letter to the Shire (particularly, that the cottages are not moveable) that the cottages are fixtures. As the cottages are fixtures we consider they form part of the land and are the Shire's property.

Summary and Conclusion

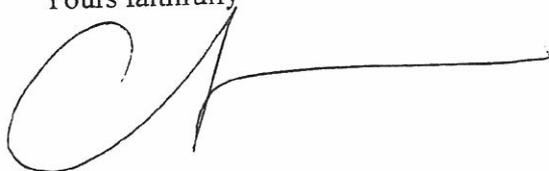
We are of the view that although arguments exist that the cottages are tenant's property there exist stronger arguments that the cottages, as they are fixed to the land, form part of the land and are therefore the landlord's property.

Please note that, as discussed, we consider, despite the above advice, it would be worthwhile requesting the Shire acknowledge that the cottages are the tenant's property and seeking an amendment to each lease in this regard, particularly that any assessment of rent will be on the basis of the land only (without taking into account the cottage). As part of this request, the history of the cottages ought to be explained to the current council of the Shire.

In relation to the review of rent under the lease, we note that the Valuer General determines the rent in each of the first year of the lease and years 2015, 2020, 2025 and 2030. There are CPI increases on 1 July of each other year.

Please do not hesitate to contact our Anton Conti if you have any queries.

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized initial 'A' followed by a long horizontal stroke.

Anton Conti
Principal

Alan & Daphne Reeve



Dale Stewart
Chief Executive Officer
Shire of Denmark
P.O. Box 183
Denmark 6333

Dear Mr Stewart,

We are writing to express our concerns over the proposed Resolution #070812 which is currently before the council. Our family was one of the original leaseholders and in all this time it has always been a given that while we don't own the land we do have rightful ownership of the infrastructure above the ground. Now we discover that the Council want to pass a resolution making them the owners of not only the land but also all the buildings above ground, that we have purchased and improved upon over the years.

If this resolution should be passed it would put us as, leaseholders in a very tenuous position. We would like to recommend that the Shire Council acknowledge that the Buildings above ground belong to the leaseholders and add an amendment to the existing lease to reflect this.

Yours sincerely,

A & D Reeve

Alan & Daphne Reeve

23rd November, 2012

1CR121116103
Shire Of Denmark
A3104/A1858
27 NOV 2012
X/REF OCR12814608

COUNCILORS	
CEO	✓
MGR OF FINANCE	
MGR OF PLANNING	
MGR OF INFRASTRUCTURE	
MGR OF COMMUNITY	

EA ✓

Mr Dale Stewart
Chief Executive Officer
The Shire of Denmark
South Coast Highway
Denmark WA 6333



20th September 2012

Dear Mr Stewart

I have leased 132 Fourth Avenue, Peaceful Bay for the past twenty five years and our families have enjoyed many happy times and associations with the region and its people. Recently we received the Shire letter regarding legal advice concerning leaseholders obligations.

After reading the document I felt rather confused about the complexity of a number of the issues raised and how they can be resolved. I know I would appreciate being able to learn more about the legalities involved and hoped it might be possible to hold an information session involving leaseholders, the Shire and someone (e.g. a lawyer, a person versed in such legalities or a facilitator) who is able to shed light on some of the issues to be resolved. It would appear we all need to work together to come to some sort of a common resolution and appreciate the fact that the Shire understands the sensitivity of this issue.

I look forward to future development and resolutions.

Yours faithfully

Heather Rose

<i>Shire Of Denmark</i>	
<i>ICE 129 15142</i>	
25 SEP 2012	
<i>A1939</i>	
EFH	
COUNCILLORS	
CEO	<input checked="" type="checkbox"/>
DIR of FINANCE	
DIR of PLANNING	
DIR of INFRASTRUCTURE	
DIR of COMMUNITY	
OTHER	

[REDACTED]
26th November 2012

The C.E.O. – Mr Dale Stewart
Denmark Shire Council
DENMARK 6333

Dear Mr Stewart,

Re Peaceful Bay.

I have been the lessee of No 7 First Avenue, Peaceful Bay since the leases were granted.
(prior to 2003 it was in my late husband's name.)

From the beginning we were given to understand that whilst the land remained the property of the Government, vested in the Shire to manage, the house and fixtures were the property of the tenant. This was also the understanding of the Shire and Councillors.

Therefore I wish to add my voice to the request that the existing lease be amended to reflect this ongoing understanding.

Yours sincerely,



Mrs Molly Smith

Shire Of Denmark	
28 NOV 2012	
ICR121116113	
EPH	
A3104/1814	
COUNCILLORS	
CEO	<input checked="" type="checkbox"/>
DIR of FINANCE	
DIR of PLANNING	
DIR of INFRASTRUCTURE	
DIR of COMMUNITY	
OTHER	

Claire Thompson

From: Stuart Strickland [REDACTED]
Sent: Sunday, 23 September 2012 8:47 AM
To: Denmark Shire Enquiries
Cc: Meg Strickland [REDACTED]
Subject: ICR12915087 - Peaceful Bay - Comments on letter dated the 28th of August
Attachments: "AVG certification".txt

Hello,

Please see my below comments on the letter dated the 28th of August in regards to the position of Peaceful Bay leases.

- Firstly I would ask for an extension of the date for comment. As your lawyer pointed out, this is a complex matter and it is near impossible to get a legal opinion in the time that you have given us to respond.
- We need further advice given that:
 - Not all of the Bay is heritage listed, much of the arguments applied do not relate to 5th avenue
 - The lawyers letter refers to timber framed houses on brick foundation as being a fixture. However most houses are timber framed on wooden stumps, making them easily moved (in fact I know of 3 dwelling in the bay that were moved there from other sites originally).
- The reality is that Peaceful Bay is operating on an archaic property ownership/leasing structure which was designed for a simpler time. To my knowledge it is the last significant area to be governed under such a structure. To prevent the burden of such matters, including the legal obligations of the shire, from weighing on all parties in the future it is vital that this structure be normalised with all other properties in the state. They must be converted to freehold.
- It is important to remember that the majority of these leases are in fact family owned for generations, and that these owners are not excessively wealthy, as the owners of other beachside real estate might be perceived to be. So this transfer cost must be kept to a minimum to prevent people from losing their properties. Both the Peaceful Bay owners and the Council must work together to make this happen as quickly and as smoothly as possible, and each party must resist the urge to profit from the deal. Until we move under a structure such a freehold, the leases will continue to grow out dated and more and more complications and obligations such as this will arise.

So my final comment is to put aside the advice you have received from McLeods. Instead charge them to constructively work on how we can exit this archaic leasing structure and move towards an identical land ownership structure that is used for all other residents of the Denmark Shire (and for the majority of the State as a whole). At the moment you are at risk of simply focusing on one symptom and many such will follow. Please spend the councils time, the ratepayers money and the owners energy on addressing the underlying root cause of the issue.

Regards
Stuart

Stuart Strickland
[REDACTED]

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Claire Thompson

From: Lance & Anita Stubberfield [REDACTED]
Sent: Wednesday, 19 September 2012 9:08 AM
To: Denmark Shire Enquiries
Subject: ICR12915013 - FW: Peaceful Bay Leaseholders your ref: DS/CT File A3104 & A1964
Attachments: "AVG certification".txt

Dear Sir,

RE: Legal Advice Concerning Leaseholders Obligations your letter dated 28th August 2012.

The above letter concerns many aspects of the lease and as the shire has had two years to get legal advice on this matter, we request that we be granted an extension on all of the above points until the 30th November 2012, so that we may be able to also receive legal advice relating to the matters outlined.

As you can probably appreciate, it will take us until the beginning of October to get an appointment with a solicitor, and we are sure that there are many more people in the same situation.

Thank you,

PR & PJ & LR & AC Stubberfield
[REDACTED]

Claire Thompson

From: Lance & Anita Stubberfield [REDACTED]
Sent: Thursday, 29 November 2012 8:54 PM
To: Denmark Shire Enquiries
Subject: ICR121116138 - Peaceful Bay Leaseholders your ref: DS/CT File A3104 & A1964

Dale Stewart
Chief Executive Officer
Shire of Denmark

As per previous correspondence and legal advice, we wish to raise the following issues regarding the taking over of the dwelling on leased property at Peaceful Bay.

- 1) If the dwelling becomes shire property, are we able to sell the lease (inclusive of dwelling) during the term of the lease?
- 2) Do current leaseholders get first pick of lease re allocation.
- 3) What costs would be involved in leasing the "dwelling/land" as compared to the current "land" lease?
- 4) What incentive is there for lease holders to spend large sums of money to improve or extend their dwelling if it is to be handed back to the shire at the end of the lease with no compensation?
- 5) What happens if a new government comes into power and decides it wants to scrap the lease arrangement altogether? Is there any compensation clauses for those leaseholders that have spent hundreds of thousands of dollars to erect or purchase a dwelling on the land?
- 6) In the lease agreement, B on the first page, it stipulates that "Subject to the consent of the Minister for Lands being obtained hereto the Lessor has agreed to grant to the Lessee a lease of the Demised Premises upon the terms and conditions hereinafter contained"
Does the above mean that the Denmark Shire is required to get consent from the Minister for Lands to change the lease to include improvements, (as stated in your letter dated 28th August 2012, Point 3, Resolution No. 070812), not for the Denmark Shire to just be able to change that clause by means of a council meeting.

It appears only fair that these issues be addressed and circulated to all leaseholders for comment and feedback, prior to the approval of council taking over the demised dwelling and said improvements at the end of the lease. At the moment, many of the leaseholders are clutching at straws, unable to determine just where we stand as leaseholders.

Thank you,

For and on behalf of

Attn: Chief Executive Officer
Shire Of Denmark

To the CEO,

I'am writing to you as a leaseholder of property in Peaceful Bay. It would be great if we could purchase our little plot of land, but as that's not about to happen to only be charged for the lease of our land and not the cottages that we have on it would be a great benefit to us.

Also has anything been done about the dust problem on East Ave such as sealing & or speed bumpss as we are on the corner of East & Second Ave's at No 20 & we have a major dust problem as the front, back & side of our place all front to the roads, so we get it from all sides & as we enjoy our leisure time out on our patio it can be very uncomfortable, as also we can't even open any windows around our house as our rooms all fill up with the dust, so it does intend to take away some of our holiday & eventually retirement comforts.

Regards
Kerry & Peter Tapper



ICR116085

Shire Of Denmark
A3104/A1827

26 NOV 2012
X/REF OCR12814608

EF:	
COUNCILLORS:	
CEO	✓
DIR of FINANCE	
DIR of PLANNING	
IR of INFRASTRUCTURE	✓
DIR of COMMUNITY	
OTHER:	

From: [REDACTED]

Sent: Monday, 26 November 2012 11:59 AM

To: Denmark Shire Enquiries

Cc: Denmark Shire

Subject: ICR121216207 - Peaceful Bay Leaseholder

enquiries@denmark.wa.gov.au

Attn: CEO

I'm writing to you as a leaseholder of property in Peaceful Bay. It would be great if we could purchase our little plot of land, but as that's not about to happen yet, to be charged rent on the **land only** would be a great benefit to us.

Also has anything been done about the **dust** problem on East Ave such as **sealing** & or **speed bumps**, as we are on the corner of East & Second Ave's at No 20 & we have a major dust problem as the front & back & side of our property all face the roads, so there's really no escaping it & as we enjoy entertaining outdoors it can be very uncomfortable, also we can't open any windows around our house as the rooms just fill with dust which is very annoying & also uncomfortable.

Regards

Peter & Kerry Tapper





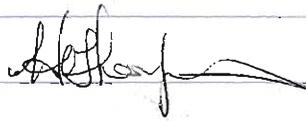
20.11.12

SHIRE PRESIDENT
MR THORNTON

Dear Sir,

My wife and I wish to register our objections, in the strongest possible terms, to the changes to the leases at Peaceful Bay as proposed in Resolution No 070812 at your recent Council Meeting

Yours faithfully

 ALAN THOMPSON

Janet Thompson JANET THOMPSON

12116044
Of Denmark
No 070812
3 NOV 2012
766/CR.1
ORS
ANCE
NNING
RASTRUCTURE
AMUNITY

cc. SHIRE Council CEO.
MR DALE STEWART

Claire Thompson

From: [REDACTED]
Sent: Friday, 30 November 2012 12:03 PM
To: Denmark Shire Enquiries
Subject: ICR121116198 - Opposal to Changes to Peaceful Bay policy on buildings.

To whom it may concern,

I am part owner of lot 41 Peaceful Bay and we are very concerned about the new proposals. In fact we are dead against any changes made by the council.

We have been at Peaceful Bay for over 55 years and in all that time we have had control over the hut but knowing that the council has control over the land.

We wish for things to stay the same now. I speak for all the owners of Lot 41 Peaceful Bay.

Yours faithfully

Lisa Tognolini



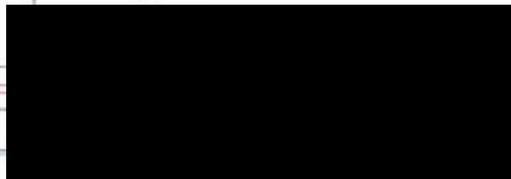
[FREE Animations for your email!](#)



[Click Here!](#)

Shire of Denmark
AZ442/A3104

11 OCT 2012



COUNCILLORS	
CEO	✓
DIR. OF FINANCE	
DIR. OF PLANNING	
DIR. OF INFRASTRUCTURE	
DIR. OF COMMUNITY	
OTHER	

08 OCT 2012

CHIEF EXECUTIVE OFFICER
SHIRE OF DENMARK,
PO BOX 183 DENMARK WA 6333.

Dear Sir,
I refer to your letter dated 28 Aug 2012 regarding tenure of lease on leasehold properties at PEACEFUL BAY.

As you stated in the above mentioned letter, RESOLUTION N° 070812 does cause "SOME CONSTERNATION"!!!!

Speaking for myself and wife, I would not have purchased a leasehold block (LOT 187 5TH AVE) if I was aware or made aware that the dwelling I was obliged to erect within two years of the purchase of the block, would revert to the Shire of Denmark if or when the lease was revoked.

My understanding was the structure I was erecting on the leasehold block was to be removed if the Denmark Shire elected not to renew the lease in July 2010.

May I suggest the current lease be amended to reflect the spirit in which I tendered \$9000 for the right to erect a dwelling at lot 187 FIFTH AVE PEACOCK BAY; i.e. The dwelling is owned by the lessee.

My dwelling at lot 187 FIFTH AVE was erected on steel stumps 2.2 METERS high to enable its removal should the eventuality occur which required its removal.

May I say I could not visualize a situation where a rural shire (SHIRE OF DENMARK) becomes the landlord for in excess of 200 dwellings!!

Yours faithfully
Ray Walker.
(RAY WALKER)

16 NOV 2012

MR DALE STEWART
CHIEF EXECUTIVE OFFICER
SHIRE OF DENMARK
PO Box 183
DENMARK WA 6333

Shire Of Denmark	
A3104/A2442	
ICR121115989	
20 NOV 2012	
X/REF ICR121015446	
EPH	
COUNCILLORS	
CEO	<input checked="" type="checkbox"/>
DIR of FINANCE	
DIR of PLANNING	
DIR of INFRASTRUCTURE	
DIR of COMMUNITY	
OTHER	

Dear Sir,

LEASEHOLD TENURE PEACEFUL BAY

REF A. Shire of Denmark letter to Peaceful Bay leaseholders dated 3 APR 2003. (ENCLOSED)

REF B. My letter to you dated ~~20~~ OCT 2012.

REF C your DS/CT File A3104 + A2442 CR121015446 dated 16 OCT 2012

Further to my letter (REF B) I enclose a photo copy of (REF A). The statement made in this letter regarding LEASEHOLD TENURE was the conditions under which I tendered \$9000 for LOT 187 FIFTH AVE PEACEFUL BAY. I tendered for this block in the

full knowledge that the land on which I erected my dwelling was vested in the Shire of Denmark BUT the dwelling was owned by me and was to be removed should the Denmark Shire decide not to renew the lease on this land.

As I stated to you in (REF B) I erected my dwelling to enable its relative ~~easy~~ removal should the lease not be renewed.

I definitely would not have spent time and money erecting a dwelling for the benefit of the Shire of Denmark. Philanthropy can extend only so far!!

Yours Sincerely
Ray Walker
(RAY WALKER)

ATTACHMENT

(1) REFERENCE A.



Shire of Denmark

South Coast Highway, Denmark WA 6333
Telephone: 08 9848 0300
Facsimile: 08 9848 1985
Email: denmarkshire@wn.com.au

To: Peaceful Bay Leaseholders

Dear Sir/Madam

Council would like to provide you with information on three important issues relevant to the Peaceful Bay Leasehold area.

(1) UP-GRADE OF TELEVISION RECEPTION AT PEACEFUL BAY

After meeting all of the selection criteria, Council has successfully obtained funding from the Commonwealth Department of Communications, Information Technology and the Arts as part of the Department's Black Spots Television Program which aims to improve television reception in remote and difficult locations throughout Australia.

Council officers have been working progressively towards the installation of a new television re-transmission facility at Peaceful Bay, which has recently been completed and is now available to the Peaceful Bay locality.

For your information, a Fact Sheet has been enclosed which provides information about the new television service and the changes that may be necessary to your television equipment and VCR to ensure that you receive the best possible television reception.

I trust that you will enjoy the new service that has been provided to the Peaceful Bay community.

Should you need to discuss this matter further, please contact Council's Manager of Community Services, Mr. Terry Mayor, at this office.

(2) LEASEHOLD TENURE

As you are aware Council has for some time been developing options for the long term tenure of the leasehold area. Prior to commenting on the progress to date I would like to clarify some aspects of the leasing situation.

- The leasehold area is within A Class Reserve 24510, the reserve is vested in the Shire of Denmark with power to lease for a maximum term of 21 years.
- Historically, lease terms have been a maximum of 10 years, with the current leases all expiring on the 30th June 2010.
- There are no renewal options contained in the lease with the lease determination clause stating:

./2..

"At the expiry or sooner determination of the term peaceable and quietly to deliver up possession of the demised premises and to remove any buildings constructed by the Lessee and any tenant's fixtures and fittings belonging thereto and shall make good any damage caused to the demises premises in so doing."

- *Council supports the continuation of ownership (either by leasehold or freehold title, whichever is finally agreed upon) beyond 2010.*
- *Department of Land Administration need to agree to the renewal of leases beyond 2010.*

In terms of the freeholding option a Local Structure Plan has been prepared. The Structure Plan is required before any rezoning and/or subdivision can occur.

Following approval of the structure plan by the WA Planning Commission, Council has progressed the issue of a water source required to support water and sewerage infrastructure. The Water Corporation was commissioned to report on this aspect, their report has been received and is currently being considered by the Peaceful Bay Community Working Group. Council's view is that the Water Corporation should be the sewerage and water infrastructure provider.

Until such time as there is deep sewerage, and reticulated treated potable water is available, freeholding of the leasehold area cannot be considered.

Apart from sewerage and water infrastructure costs there are other costs such as the purchase of portion of the reserve that the leasehold lots are on, from the Government, waste management infrastructure, rezoning and subdivision costs, etc., etc., that have to be taken into account when establishing a freehold sale price per lot.

If and when the water source and reticulated sewerage issues are resolved Council will be in a position to advise leaseholders an approximate purchase price per lot. It must be stressed however that no decision has been made as to whether or not the leases should be freeholded. This question will be put to leaseholders once the costs are known. In the meantime leaseholders should not be unduly concerned about security of tenure. Council supports the continuation of the Peaceful Bay leasehold area. Whether this is achieved by freeholding or by renewal of leases will be determined in consultation with current leaseholders.

(3) PEACEFUL BAY 'RING ROAD'

In consultation with the Peaceful Bay Progress Association, Council is seeking comment from landowners and leaseholders at Peaceful Bay on the proposed construction of a road linking the Peaceful Bay Road from East to West, thus forming a ring road surrounding the leasehold settlement. Attached is a sketch showing the proposal.

The aim of completing the 'ring road' is to reduce through traffic within the leasehold area. It is envisaged that the constructed road will incorporate traffic calming measures

13..

such as speed humps and slow points to keep traffic speeds to a minimum and a local area traffic speed restriction will apply. The safety of pedestrians (in particular children) and other vulnerable road users should be considered a high priority. In addition, some parking improvements are proposed.

The costs of the proposal are indicative only and are as follows:

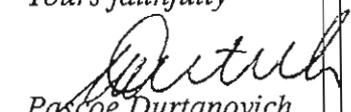
- | | |
|---|----------|
| ▪ Road Construction | \$50,000 |
| ▪ Installation of Culvert at Creek Crossing | \$12,000 |
| ▪ Parking Improvements | \$15,000 |

The proposal will be subject to approvals from relevant agencies such as the Department of Environmental Protection, Department of Indigenous Affairs, Water & Rivers Commission and CALM.

Before Council progresses the issue further it is seeking input from leasehold and freehold property owners in the Peaceful Bay settlement. Your comments on the proposal are invited and will be received until the 29th April 2003. To assist you a response form has been included, together with a reply paid envelope.

If you require further explanation of the proposal, please contact either Council's Manager - Engineering Services, Matt Thomson, or myself on telephone 9848 0300.

Yours faithfully


Pascoe Durtanovich
Chief Executive Officer

3rd April 2003

Attn: Dale Stewart
CEO – Shire of Denmark
Po Box 183
Denmark 6333

Dear Dale

Thankyou for taking the time recently to discuss the current lease issues at Peaceful Bay prior to our purchase of 199 Fifth Avenue. You gave me much more clarity on the current situation and I went away with a more positive view of the shires intent. I would like to submit some points for the consideration of the shire council for the upcoming meeting.

We have recently purchased a leasehold property at Peaceful Bay and as discussed with the CEO, we were informed by the Agent that we were purchasing the house and not the land. As this was the long standing belief of leaseholders in the Bay, we were happy to purchase after receiving legal advice and that of our Settlement Agent. It was only very close to settlement that we heard of the legal advice that had been received by the shire defining the term 'demised premises' (which had in the previous lease referred to the land), and ownership of the 'demised premises' – at this point, if we could have stopped the purchase, we would have done so as I felt very distressed and concerned that there was greater risks involved in the purchase than we had initially considered.

Having received a copy of the letter to leaseholders dated 28 August 2012 I would like to state my objection to the implied changes and in particular to resolution No. 070812 – the current lease states that fixtures, fittings and **improvements** to the demised premises must be removed by the lessee at the end of the term, therefore implying they belong to the leaseholder. This should not limit our ability to gain approval from the shire to apply for planning consent for improvements.

In regard to Resolution No. 080812 – I agree that annual inspection would be a physical and financial burden on the shire and in addition would find it to be onerous and unnecessary for the lessee.

In regard to the greater issue at hand, I would ask the shire to acknowledge the status quo at Peaceful Bay, being that the cottages are the property of the tenant and make necessary amendments to the lease. This limits the potential risks in the future that the rent assessment fees become linked to the cottage not just the block and also that in a situation where lease renewal becomes imminent, the cottages are not viewed as an asset of the shire and therefore become a possible asset for revenue raising. The suggested resolutions made will lead to increasingly complex issues surrounding renewal in the future.

What this issue has done for many people is make us realise how risky our purchases and investments are considering the high market value in the Bay. It has caused distress within the community and a feeling that we are not respected, represented or supported as ratepayers within the shire. There is a general sense of pride in the bay and sympathetic improvements to the cottages are an important part of the identity and heritage value of the settlement – the change in status from 'cottage owner' to 'cottage lessee' may lead increasingly to a lower level of maintenance and improvement as we get closer to renewal and people begin to assess their investments into maintenance.

We went into this purchase with full knowledge that there is no right of renewal on the leases, and accepted this point. We felt that the precedent for renewal was set and were comfortable with the status quo and how the shire had always dealt with the leaseholders in the Bay. Recently we have heard there may be a potential to freehold or strata title the properties in the future. Although I expect this to be a costly exercise (both to the shire and the leaseholder), I strongly support this plan of action as I believe that the current Shire is in a position to support the residents of the Leasehold areas of Peaceful Bay to gain greater stability. I also believe that taking this course of action will lead to better health and environmental outcomes for the bay as leaseholders will be required to connect to deep sewerage. Should a working group be formed, I would be interested in taking part in any relevant discussions.

Outside of this issue, I would like to take this opportunity to acknowledge the shire to date for its ongoing support of Peaceful Bay and the infrastructure provided. It's a beautiful part of the Denmark Shire and our purchase will go a great way in providing a wonderful lifestyle for ourselves and our children for at least the extent of the current lease. I look forward to seeing progress and development at Peaceful Bay and am sure it will be a thriving holiday and residential precinct into the future.

Best Regards

Phillip and Amber Ward



28th November 2012



DISCUSSION / MEETING / CONVERSATION FILE NOTE

This form can be used to record a discussion which can be stored on the relevant file.

SUBJECT: Peaceful Bay Legal Advice

NATURE OF COMMUNICATION (please tick): In Person Telephone Video Conference

DAY & DATE: Wednesday, 24 October 2012 TIME: 2.35pm

ATTENDEES:

Please tick and/or add the persons who attended or participated in the discussion/meeting.

- | | | |
|--|---|--|
| <input checked="" type="checkbox"/> Chief Executive Officer | <input checked="" type="checkbox"/> Cr Thornton | <input type="checkbox"/> Cr Pedro |
| <input type="checkbox"/> Director of Finance & Administration | <input checked="" type="checkbox"/> Cr Sampson | <input type="checkbox"/> Cr Rowland |
| <input type="checkbox"/> Director of Planning & Sustainability | <input type="checkbox"/> Cr Gillies | <input type="checkbox"/> Cr Seeney |
| <input type="checkbox"/> Director of Community & Reg. Services | <input type="checkbox"/> Cr Hinds | <input type="checkbox"/> Cr Syme |
| <input type="checkbox"/> Director of Infrastructure Services | <input type="checkbox"/> Cr Lewis | <input checked="" type="checkbox"/> President, Peaceful Bay Progress Association, Don Hodgetts |
| <input type="checkbox"/> Manager of Recreation Services | <input type="checkbox"/> Cr Marshall | <input checked="" type="checkbox"/> Tony Duckett |
| <input type="checkbox"/> Youth Centre Coordinator | <input type="checkbox"/> Cr Morrell | <input checked="" type="checkbox"/> Janine Phillips |
| <input type="checkbox"/> Comm. Emergency Services Manager | <input type="checkbox"/> Cr Osborne | <input type="checkbox"/> Other _____ |

Meeting held in the Council's Reception Room.

The meeting was called at the request of the PBPA to discuss their legal advice received from Talbot Olivier Lawyers in response to Council's legal advice from McLeods on the same issue.

The PBPA provided Council with a copy of their legal advice dated 15 October 2012, which, essentially confirmed Council's legal advice that the fixtures on the land including the building form part of the land and are therefore the landlords property.

The Progress Association noted that in a letter dated 3 April 2003 to the Peaceful Bay Leaseholders (copy attached) it quoted from the then lease "At the expiry or sooner determination of the term peaceable and quietly to deliver up possession of the demised premises and to remove any buildings constructed by the lessee and any tenants fixtures and fittings belonging thereto and shall make good any damage caused to the demised premises in so doing."

Mr Stewart noted that he would check the wording of the Peaceful Bay Lease which expired on 30 June 2010 to see whether the above quotation from Council was correct (copy of the then lease has been attached).

Mr Stewart noted that it had never been a deliberate intention of Council to change the lease clause to give effect to the Council owning the buildings however this would appear consistent with the intent of the adopted Local Planning Policy No. 35 and the Peaceful Bay Heritage Precinct Conservation Plan 2003 accompanying.

It was noted that the Council had agreed to an extension of time in which to submit comment regarding the proposed new policy until the 30 November 2012. Mr Stewart noted that, all things being equal, a report would be prepared, on the matter, for the Council meeting of 18 December 2012.

Mr Duckett suggested that what would be useful would be for the PBPA to confirm that the Council had no intention to seek to acquire the buildings. The Shire President and Mr Stewart confirmed that this was

22 January 2013 - Attachment 8.5.2 d)

certainly not a conscious or deliberate intent of the new lease clause and that the issue became apparent when the recent demolition request was considered and the apparent contradiction surfaced between what the Conservation Plan and Local Planning Policy intended compared to the Council, Councillors and the Lessees perception of what was intended.

It was noted that the Conservation Plan and Local Planning Policy did not preclude demolition and Mr Stewart suggested what might be helpful into the future might be the development of heritage or character guidelines to inform new or major alterations to buildings.

Conversation then turned to solutions.

it was acknowledged that the Council and Lessees had a risk of the Government of the day in 2031 of not agreeing to another extension of lease for various reasons such as sea level rise, asbestos, government's view of the use of recreation land or indeed environmental or public health concerns (water & ground water).

It was generally acknowledged by the group that a long term solution would indeed be to seek conversion of the leasehold to a more secure form of tenure such as strata or freehold. To achieve this would require investment in infrastructure such as effluent disposal, water, power and roads.

Mr Stewart suggested that a potential officer recommendation that he was considering following this discussion was along the following lines;

That the Council defer further consideration of the issues associated with the implications of the lease documents purporting to vest ownership of the buildings in the shire until such time as the Council has considered a discussion paper on the merits of converting the leasehold properties to strata or freehold which is to be prepared in conjunction with representatives of the Peaceful Bay Progress Association as a Working Group.

It was noted that any conversion to a more secure form of tenure for the leaseholders would require the following elements to be addressed;

- An in perpetuity dividend to ratepayers;
- Transition issues associated with finance of the infrastructure as well as the acquisition by leaseholders;
- A dividend to the environment (infrastructure);
- A dividend to the lessees (tenure, health and occupancy rights);
- A dividend to the community (civic infrastructure such as a community hall); and
- A dividend to the State (acquisition price and improved management of the reserve in its new tenure).

The meeting concluded at 4.05pm.

It was noted that a copy of the notes would be forwarded to Mr Hodgetts and Mrs Phillips.

Additional pages attached? Yes No

YOUR NAME: Dale Stewart, CEO

SIGNED: _____

TalbotOlivier
LAWYERS

Our ref: AC.SZD:46799
Contact: Sascha de Lacy-Koenig
Direct line: 9420 7170
Direct email: sdelaeykoenig@talbotolivier.com.au
Principal: Anton Conti

15 October 2012

Mr J Burkett and Ms Janine Phillips
C/- 191 Fifth Avenue
PEACEFUL BAY WA 6333

By Post

Dear Janine

**Advice on Lease and Ownership of Cottages – Peaceful Bay Reserve
24510**

Thank you for your instructions to review the following:

- sample copy of the lease agreement in respect of Peaceful Bay Reserve 24510 (**the reserve**) on Land Administration Statutory Services Plan 20017 commencing 1 July 2010 and expiring 30 June 2031 (**current lease**); and
- copy of a previous lease agreement in respect of Lot 191 of Peaceful Bay Reserve 24510 commencing 1 July 1991 and expiring 30 June 2010 (**previous lease**),

and to advise you whether the cottages on various lots within Reserve 24510 (**the cottages**) are owned by the tenant of such lot or owned by the Shire of Denmark (**the Shire**)

We advise as follows:

Terms of the Current Lease and Previous Lease

The Current Lease contains provisions that support an argument that the cottages are the property of the tenants. These are:

- the Definition of Demised Premise referring to “that part of the Land” (without mentioning improvements or buildings) and referring to it being a “Site”. Usually when a building is included in Premises reference is made to it;
- clause 5.02 where it provides that the tenant is to “maintain the Demised Premises and all improvements placed thereon” (our emphasis). The argument being that if the Demised Premises contained the improvements there should be no need for the drafters of the lease to have included “and all improvements placed thereon”; and


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THE GLOBAL LEGAL NETWORK
1184226v1

Level 8, Westfarmers House
40 The Esplanade, Perth WA 6000
Postal Address: GPO Box 2569 Perth WA 6000
Telephone: (08) 9420 7100 Facsimile: (08) 9420 7101
Email: talbots@talbotolivier.com.au
www.talbotolivier.com.au
Talbot Olivier Pty Ltd
ACN 126 990 949

Ken
Tob
AOL
Tony
Jan
Janine
AOL

- clause 14.02 where it provides that the tenant is to remove all fixtures and fittings and improvements within 14 days of the expiration of the term, but only those erected or installed by the tenant (clause 14.02). This clause suggests that under the current lease any fixtures, fittings and improvements constructed by the tenant during the term of the lease are the property of the tenant.

Please note that both the current lease and the previous lease are silent on the position in relation to improvements made by a previous tenant. The inference being that the current tenant may not be permitted to remove improvements made by a previous tenant or any improvements made by the landlord.

Notwithstanding this, the law generally takes the view that, without very clear terms in a lease to the contrary, the 'land' includes any fixtures (including buildings). Even though both the current lease and the previous lease contain the right to remove the cottages, this does not affect who is deemed to be the owner of the cottages. If the cottages are deemed to be fixtures, at law, they are the property of the landowner even though the tenants have the right to remove them.

Is the cottage a fixture?

To determine whether the cottages are fixtures the courts have regard to a number of factors. These include:

- the degree of annexation to the land, that is, how well it is fixed to the land;
- whether removal will cause substantial damage. If so, a fixture will be the more reasonable conclusion; and
- whether the apparent intention was for something to be secured for a long or short time.

Please note that it is not a determining factor as to who has paid for the cost of the fixture.

If an item is affixed to land to any extent (other than merely resting by its own weight), it is presumed to be a fixture.

The Peaceful Bay Heritage Precinct Conservation Plan at pages 48 and 49 provides the following information about the cottages:

- most have a small footprint in proportion to the blocks;
- simple in form;
- some were relocated from the mill towns around Shannon; and
- most were constructed with a timber frame and lightweight cladding.

We consider, having regard to the information provided to us, including the photographs of the cottages and the description of the cottages in McLeod's letter to the Shire (particularly, that the cottages are not moveable) that the cottages are fixtures. As the cottages are fixtures we consider they form part of the land and are the Shire's property.

Summary and Conclusion

We are of the view that although arguments exist that the cottages are tenant's property there exist stronger arguments that the cottages, as they are fixed to the land, form part of the land and are therefore the landlord's property.

Please note that, as discussed, we consider, despite the above advice, it would be worthwhile requesting the Shire acknowledge that the cottages are the tenant's property and seeking an amendment to each lease in this regard, particularly that any assessment of rent will be on the basis of the land only (without taking into account the cottage). As part of this request, the history of the cottages ought to be explained to the current council of the Shire.

In relation to the review of rent under the lease, we note that the Valuer General determines the rent in each of the first year of the lease and years 2015, 2020, 2025 and 2030. There are CPI increases on 1 July of each other year.

Please do not hesitate to contact our Anton Conti if you have any queries.

Yours faithfully

Anton Conti
Principal

PBTSJ.
Stata/f.
transitions to federal.
Stays
→ tenure.

'govt' might not allow! (not the way to buy the land. (only do if federal/sunny) → fix water/sewage



Shire of Denmark

South Coast Highway, Denmark WA 6333
Telephone: 08 9848 0300
Facsimile: 08 9848 1985
Email: denmarkshire@wn.com.au

To: Peaceful Bay Leaseholders

Dear Sir/Madam

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(1) UP-GRADE OF TELEVISION RECEPTION AT PEACEFUL BAY

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I trust that you will enjoy the new service that has been provided to the Peaceful Bay community.

Should you need to discuss this matter further, please contact Council's Manager of Community Services, Mr. Terry Mayor, at this office.

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- *The leasehold area is within A Class Reserve 24510, the reserve is vested in the Shire of Denmark with power to lease for a maximum term of 21 years.*
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- *There are no renewal options contained in the lease with the lease determination clause stating:*

/2..

"At the expiry or sooner determination of the term peaceable and quietly to deliver up possession of the demised premises and to remove any buildings constructed by the Lessee and any tenant's fixtures and fittings belonging thereto and shall make good any damage caused to the demises premises in so doing."

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In terms of the freeholding option a Local Structure Plan has been prepared. The Structure Plan is required before any rezoning and/or subdivision can occur.

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If and when the water source and reticulated sewerage issues are resolved Council will be in a position to advise leaseholders an approximate purchase price per lot. It must be stressed however that no decision has been made as to whether or not the leases should be freeholded. This question will be put to leaseholders once the costs are known. In the meantime leaseholders should not be unduly concerned about security of tenure. Council supports the continuation of the Peaceful Bay leasehold area. Whether this is achieved by freeholding or by renewal of leases will be determined in consultation with current leaseholders.

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The aim of completing the 'ring road' is to reduce through traffic within the leasehold area. It is envisaged that the constructed road will incorporate traffic calming measures

13..

such as speed humps and slow points to keep traffic speeds to a minimum and a local area traffic speed restriction will apply. The safety of pedestrians (in particular children) and other vulnerable road users should be considered a high priority. In addition, some parking improvements are proposed.

The costs of the proposal are indicative only and are as follows:

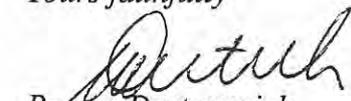
- | | |
|---|----------|
| ▪ Road Construction | \$50,000 |
| ▪ Installation of Culvert at Creek Crossing | \$12,000 |
| ▪ Parking Improvements | \$15,000 |

The proposal will be subject to approvals from relevant agencies such as the Department of Environmental Protection, Department of Indigenous Affairs, Water & Rivers Commission and CALM.

Before Council progresses the issue further it is seeking input from leasehold and freehold property owners in the Peaceful Bay settlement. Your comments on the proposal are invited and will be received until the 29th April 2003. To assist you a response form has been included, together with a reply paid envelope.

If you require further explanation of the proposal, please contact either Council's Manager – Engineering Services, Matt Thomson, or myself on telephone 9848 0300.

Yours faithfully


Pascoe Durtanovich
Chief Executive Officer

3rd April 2003

PEACEFUL BAY LEASE AGREEMENT

LOT ~~67~~

B E T W E E N

SHIRE OF DENMARK
("the Lessor")

A N D

~~Robert John WHITFIELD~~
~~Gabrielle Dawn WHITFIELD~~

("the Lessee")

LEASE

1. The Lessor HEREBY LEASES the demised premises to the Lessee for the term specified in Item 3 of the Schedule ("the term") the Lessee yielding and paying therefor the rent reserved by clause 2 hereof and otherwise upon the terms and conditions herein contained.

RENT

2. The Lessee shall pay to the Lessor:

- (a) for the first three (3) years of the term, the clear annual rental specified in Item 4 of the Schedule payable in the manner specified in Item 5 of the Schedule; and
- (b) for the fourth and each succeeding year of the term such annual rent (payable by annual instalments in advance on the 1st day of July each year) as is determined pursuant to Clause 3,

and otherwise upon the terms and conditions contained herein.

RENT REVIEW

3. (1) The annual rent shall be reviewed on the date of commencement of each succeeding year of the term as from 1st July, 1992, ("the Rent Review Date") and the Lessee shall pay such annual rent as is determined in accordance with this Clause.

- (2) (a) Subject to Clause 3(2)(b) the Lessor shall not earlier than three (3) months before, and not later than three (3) months after the Rent Review Date give to the Lessee a notice in writing ("the Lessor's Notice") of the annual rent to be payable from the Rent Review Date. The annual rent to be payable at the Rent Review Date shall be an amount determined by an Independent Licensed Valuer appointed at the request of the Lessor by the President, for the time being, of the Australian Institute of Valuers (WA Division) Incorporated as being the current market rent which in the opinion of that Licensed Valuer would be obtained for the demised premises on a free and open market and if the demised premises were unoccupied and offered for rental for use as a holiday cottage and otherwise on the same terms and conditions in the Lease

PROVIDED THAT the annual rent so determined shall not be less than an amount equal to the annual rent payable immediately prior to the Rent Review Date.

- (b) The Lessor shall not by reason of its failure to give the Lessor's Notice within the time referred to in Clause 3(2)(a) forfeit its right to have the annual rent reviewed and if the Lessor gives the Lessee notice in writing later than the time referred to in Clause 3(2)(a) then the Lessor's Notice whenever given shall be of the same force and effect as if it were given as specified in Clause 3(2)(a), and the rate at which the annual rent is payable shall be payable from the date of the notice if the notice is sent after the period of three (3) months from the Rent Review Date.
- (c) Until the annual rent payable from the Rent Review Date is determined the Lessee shall continue to pay rent to the Lessor at the rate payable immediately prior to the Rent Review Date. If the annual rent determined by the Licensed Valuer is higher than the annual rent previously payable the Lessee shall forthwith pay to the Lessor the difference between the amount of rent paid by the Lessee from the Rent Review Date and the amount which would have been paid had the new rent been determined pursuant to clause 3(2)(a).
- (d) In making his determination the Licensed Valuer shall be deemed to be acting as an expert and not as an arbitrator.

LESSEE'S COVENANTS

4. The Lessee HEREBY COVENANTS with the Lessor as follows:

Payment of Rent

- (a) To pay the Lessor the rent hereby reserved at the times and in the manner provided herein.

Rates, Taxes & Outgoings

- (b) To pay and discharge all rates and taxes including land tax assessed or charged in respect of the demised premises and all other outgoings, including without limitation all telephone, electricity, gas, water, rubbish collection and sewerage

charges levied, charged or imposed upon the demised premises or any part thereof or arising out of the use thereof and whether expressed to be payable by the owner or occupier thereof.

Erection of Cottage

- (c) If no cottage has been constructed on the demised premises then to commence the erection of a cottage ("the cottage") upon the demised premises within six (6) calendar months from the commencement of the term and to complete the erection of the cottage within twenty-four (24) months after the commencement of the term.
- (d) If a cottage is required to be constructed pursuant to paragraph (c) of this clause then the cottage shall be erected:
- (i) in compliance with the building and health by-laws of the Lessor;
 - (ii) in a workmanlike manner;
 - (iii) in accordance with plans and specifications previously approved by the Lessor in writing such plans and specifications being submitted to the Lessor in duplicate showing a ground plan, front and elevations and a block plan;
 - (iv) in compliance with the Building Code of Australia 1988 and the provisions of all statutes, town planning schemes, regulations and other by-laws;
 - (v) Not to use corrugated iron or rough face cut cladding on the exterior walls of the cottage.

Rainwater Tank

- (e) (i) To construct connect and maintain a storage tank for the retention of at least (4,640) litres of rainwater within twenty four (24) months of the date of commencement of the term PROVIDED THAT the provisions of this clause shall

not apply where the Lessee herein named has leased the demised premises from the Lessor immediately prior to the commencement of the term and where rainwater retention facilities have already been constructed; and

- (ii) Not to construct any replacement rainwater tank on the demised premises of a capacity less than (4,640) litres.

Construction of a Septic Tank

- (f) To provide a septic tank water closet system approved by the Commissioner of Public Health and the Health Surveyor of the Lessor within one (1) month after the completion of the construction of any new cottage.

Maintenance, Repairs & Painting

- (g) To keep and maintain every part of the demised premises and all additions thereto and all lighting and electrical installations and all drainage and all other fixtures and fittings in good repair and condition.

Cleaning

- (h) At its own expense during the term at all times to keep and maintain the demised premises clean, drained, free from rubbish, refuse and disused material of any kind and in good and sanitary repair and condition.

Entry by Lessor to View and to Repair

- (i) Subject to reasonable notice to permit the Lessor, the Lessor's architects, servants and agents with or without workmen and others at all reasonable times to enter into and upon the demised premises and every part thereof in order to view and examine the state of repair order and condition thereof and to leave upon the demised premises notice of any want of repair order condition neglect or defect for which the Lessee is liable and requiring the Lessee to make good the same within such time as is specified in such notice and the Lessee will make good the same in accordance with the notice to the satisfaction of the Lessor.

- (j) To permit the Lessor, the Lessor's architects, servants and agents with or without workmen or others at all reasonable times and, in the case of emergency, at any time to enter into and remain upon the demised premises with all necessary plant equipment and materials to carry out any works or make any repairs or alterations or additions to the demised premises or to any building of which the demised premises may form part.

Abatement of Nuisances

- (k) Not to do or leave undone any act matter or thing which may be or be deemed to be a nuisance within the meaning of the Local Government Act, the Health Act, the Factories and Shops Act or any other Act or under any by-laws or regulations applicable to the demised premises or the use or occupation thereof by the Lessee and forthwith to abate any such nuisance or alleged nuisance.
- (l) To ensure that the demised premises are not used in any manner which may be or become a nuisance disturbance or annoyance to the quiet and comfort of any occupier of any land in the vicinity of the demised premises and on being required to do so by the Lessor or any officer of the Lessor to forthwith abate any such nuisance, disturbance or annoyance.

Pests

- (m) To take all reasonable precautions to keep the demised premises free of ants, pests and vermin.

Compliance with Statutes

- (n) At its own expense to comply with, carry out and perform the requirements of the Local Government Act, the Health Act and all other Acts, town planning schemes, by-laws or regulations or of any requisitions or orders thereunder applicable to the demised premises or the use or occupation thereof.

Permitted Use

- (o) Not without the prior written consent of the Lessor on each occasion had and obtained to use the demised premises otherwise than for the occupation of a cottage.

Prohibited Use

- (p) Not without the prior written approval of the Lessor to use or permit the use of the demised premises or the cottage as a place of permanent residence by any person or for any commercial or business use.

Destruction of Native Trees and Shrubs

- (q) Not to destroy fell or cut down any native trees or shrubs on the demised premises unless it is absolutely necessary in order to erect, construct and maintain the cottage and other improvements approved of by the Lessor from time to time.

Disturbance of Soil

- (r) Not to disturb the surface soil of the demised premises in any manner likely to cause soil erosion.

Indemnity

- (s) To indemnify the Lessor and keep the Lessor indemnified from and against all claims, demands, writs, summonses, actions, suits, proceedings, judgments, orders, decrees, damages, costs, losses and expenses of any nature whatsoever which the Lessor may suffer or incur in connection with the loss of life, personal injury or damage to property arising from or out of any occurrence in upon or at the demised premises or the use by the Lessee of the demised premises or any part or to any person or the property of any person using or entering or near any entrance to the demised premises or occasioned (wheresoever it may occur) wholly or in part by any act, neglect, default or omission by the Lessee its agents, contractors, servants, workmen, customers, members or any other person or persons using or upon the demised premises with its consent or approval expressed or implied.

Insurance

- (t) (i) To insure and keep insured with an insurer authorised to operate under the Insurance Acts 1973 (as amended) against all liability to any person or property for any reason arising in or about the demised premises in a sum from time to time required by the Lessor but in any event not less than ONE MILLION DOLLARS (\$1,000,000.00) in respect of any one claim;
- (ii) To arrange for the interest of the Lessor as Lessor to be endorsed on the policy of insurance;
- (iii) To pay all premiums and to comply with the requirements of the insurer relating to the insurance policy and to the demised premises;
- (iv) Not at any time to reduce the amount of insurance without obtaining the consent of the Lessor;
- (v) Not to do any act or thing that may cause any insurance premium to be increased or that may cause the insurance to be prejudiced or become liable to be cancelled or avoided or whereby any claim on the insurance policy may be or become liable to be reduced; and
- (vi) To deliver to the Lessor as soon as practicable a copy of the Schedule of the insurance policy and if not contained in the Schedule particulars of the insurer, the amount of cover, verification that the Lessor's interest has been endorsed on the policy, the policy number and any variations to the policy from time to time.

Alterations & Improvements

- (u) Not without the prior written consent of the Lessor (which consent the Lessor shall have an absolute right to withhold without giving any reason therefor) to erect or

suffer to be erected any building or structure on the demised premises or to make or suffer to be made any alteration in or additions to any building or any other improvements to the demised premises or to remove any such improvements or to cut maim or injure or suffer to be cut maimed or injured any of the walls or timbers thereof.

Assignment or Sub-letting

- (v) Not to assign, sub-let or part with the possession of the demised premises or any part thereof without the consent in writing of the Lessor and the Minister for Lands first had and obtained and the provisions of Sections 80 and 82 of the Property Law Act 1969 shall not apply to this Lease PROVIDED THAT the Lessor will not unreasonably withhold its consent to an assignment of the demised premises and if such consent is given it shall be subject to the assignee executing and delivering to the Lessor a Deed of Assignment at the cost of the Lessee in such form prepared by the Solicitors of the Lessor from time to time.

Notice as to Intention

- (w) To notify the Lessor in writing at least six (6) months before the end of the term of the Lessee's intention either to vacate or negotiate for a lease for a further period.

Legal Costs

- (x) To pay the costs incurred by the Lessor for the purpose of or incidental to the preparation and service of any notice under Section 81 or any other section of the Property Law Act 1969 requiring the Lessee to remedy a breach of any of the covenants herein contained.

Delivery Up of Possession

- (y) At the expiry or sooner determination of the term peaceable and quietly to deliver up possession of the demised premises and to remove any buildings constructed by the Lessee and any tenant's fixtures and fittings belonging thereto and shall make good any damage caused to the demised premises in so doing.

LESSOR'S COVENANT

5. (a) Quiet Enjoyment

The Lessor HEREBY COVENANTS with the Lessee that the Lessee duly and punctually paying the rent hereby reserved and observing and performing the covenants herein expressed and implied and on the Lessee's part to be observed and performed shall during the term quietly enjoy the use and occupation of the demised premises without interruption by the Lessor or any person lawfully claiming through or under the Lessor.

(b) Stamp Duty

The Lessor will pay all State Stamp Duty payable on this lease and the duplicates thereof.

MUTUAL AGREEMENTS

6. IT IS HEREBY MUTUALLY AGREED as follows:

Default by Lessee

(a) If:

- (i) any rent hereby reserved or any part thereof is at any time in arrears for fourteen (14) days after the same shall have become due (whether or not any formal or legal demand is made therefor);
- (ii) (subject to the provisions of the Bankruptcy Act 1966) the Lessee becomes bankrupt or suffers the Lessee's interest in this Lease to be taken in execution or being a company calls a meeting of its creditors, has a receiver appointed, goes into liquidation or has any order made against it for winding up of the Lessee;
- (iii) the Lessee calls a meeting of the Lessee's creditors or makes any composition or arrangement with or assignment for the benefit of the Lessee's creditors

or suffers any execution under any legal process to issue or be levied upon or against any of the Lessee's goods or chattels; or

(iv) the Lessee breaches or fails to observe and perform any covenant condition or stipulation herein expressed or implied and on the part of the Lessee to be observed or performed and the Lessee fails to remedy such breach if it is capable of remedy and to make reasonable compensation in money to the Lessor for the breach within twenty eight (28) days (which the parties hereto expressly agree shall be a reasonable period) or such further time as the Lessor may allow after the service of the notice required by Section 81 of the Property Law Act,

THEN this Lease and the term shall at the option of the Lessor cease, determine and be absolutely void and the Lessor may thereupon without notice re-enter upon, occupy and resume possession of the demised premises in the name of the whole but without releasing the Lessee from liability for rent up to the determination of this Lease or for any antecedent breach and for the purpose of such re-entry the Lessor and all persons authorised by the Lessor may forcibly eject or put out the Lessee and any licensee and any property or thing belonging to the Lessee or the Licensee found thereon without being liable to any action for trespass, assault or other proceedings whatsoever for so doing but with liberty to plead the leave and licence hereby given in bar of any such action or proceedings if any such action or proceedings is brought or instituted.

(b) Lessee's Right to Determine

(i) If the Lessee gives to the Lessor three (3) months notice in writing of his intention to determine the term and all rent and other moneys (and interest) have been paid by the Lessee up to and including the date of the expiration of the notice and there is no existing breach of any of the terms and covenants herein expressed and implied on the part of the Lessee to be observed and performed then this lease shall at the expiration of the notice

cease, determine and be absolutely void PROVIDED THAT the Lessee shall not be entitled to any refund of rental or rates overpaid.

Entry by Lessor

- (c) If the Lessee shall fail to duly and punctually observe or perform any covenant, condition or agreement herein expressed or implied and on the part of the Lessee to be observed and performed the Lessor shall be entitled to carry out the observance or performance of such covenant, condition or agreement and for such purpose the Lessor or the Lessor's agents workmen or architects may if necessary enter the demised premises or any part thereof and the cost and expense incurred in such observance or performance together with interest thereon at the rate of sixteen (16) per centum per annum shall be a debt due by the Lessee to the Lessor and shall be payable on demand and may be recovered by the Lessor in the same manner as if such debt were for rent due under this Lease in arrear by action in law and such cost expense and interest shall be a charge on the term.
- (d) If any buildings constructed by the Lessee and any tenants fixtures and fittings belonging to the demised premises are not removed in accordance with Clause 4(y) then they shall become the property of the Lessor without any right on the part of the Lessee to payment or compensation therefor.

Service of Notices

- (e) That all notices, consents and approvals or any demand to be given to or made upon the Lessee shall be in writing and may be signed by the Lessor or its solicitors or agents and all such notices or demands shall be considered as having been properly served upon the Lessee if personally served on the Lessee or posted to the Lessee at its last known address and if so posted shall be conclusively deemed to be served upon and be received by the Lessee at the expiration of three (3) days following the day when the same shall be posted whether the contrary is shown or not and notwithstanding the provisions of Section 135 of the Property Law Act 1969.

Headings

- (f) That the headings appearing in this Lease are inserted only as a matter of convenience and in no way define, limit, construe or describe the scope or intent of the clauses of this Lease nor in any way affect this Lease.

Definitions

- (g) That whenever herein appearing unless repugnant to the sense or context:

The expression "Lessor" shall if only one Lessor is party hereto mean the Lessor and the executors, administrators and assigns of the Lessor and shall if there are two or more Lessors parties hereto mean the Lessors and each of them and their and each of their executors, administrators and assigns and if the Lessor or any of the Lessors shall be a corporation shall include such corporation and its successors and assigns.

The expression "Lessee" shall if only one Lessee is party hereto mean the Lessee and the executors, administrators and permitted assignees of the Lessee and if there are two or more Lessees parties hereto shall mean the Lessees and each of them and their and each of their executors, administrators and permitted assigns and if the Lessee or any of the Lessees shall be a corporation shall include the successors and permitted assigns of such corporation.

The expression "cottage" means any building for the accommodation of people approved by the Lessor from time to time.

Words importing the masculine gender shall include the feminine gender and shall also have application to corporations.

Words importing the plural number shall include the singular number and words importing the singular number shall include the plural number.

References to statutes shall include all statutes amending the statutes referred to or passed in lieu thereof.

When two or more Lessors or Lessees (as the case may be) are parties hereto the covenants and agreements on their part shall bind them and any two or greater number of them jointly and severally.

ESSENTIAL TERMS

7. The covenants by the Lessee hereinbefore contained to pay rent and rates, taxes and outgoings in respect of the demised premises at the time and in the matter therein respectively prescribed are essential terms of this Lease and any breach of any of those covenants shall be regarded by the Lessor and the Lessee as a fundamental breach by the Lessee of this Lease. Should the Lessor determine this Lease following such a breach then (without prejudicing or limiting any other right or remedy of the Lessor arising from such breach or otherwise under this Lease) the Lessor shall be entitled to recover from the Lessee and the Lessee hereby covenants to pay to the Lessor as and by way of liquidated damages for such breach the rent, rates, taxes and outgoings which would have been payable by the Lessee for the unexpired residue of the term of this Lease remaining after such determination after making allowance for the rent, rates, taxes and outgoings which the Lessor by taking reasonable steps to relet the demised premises obtains or could reasonably be expected to obtain by reletting the demised premises for such unexpired residue of the term hereof on reasonable terms as to rental and otherwise PROVIDED THAT:

- (a) any such reletting shall not be required to be on like terms as are herein expressed and implied;
- (b) the acceptance by the Lessor of arrears or any late payment of the rent, rates, taxes or outgoings shall not constitute a waiver of the essentiality of the Lessee's obligations to make such payments;

- (c) the Lessor's entitlement to recover damages as aforesaid shall not be prejudiced or limited if:
- (i) the Lessee abandons or vacates the demised premises;
 - (ii) the Lessor elects to re-enter the demised premises or to determine this Lease;
 - (iii) the Lessor accepts the Lessee's repudiation of this Lease; or
 - (iv) the parties' conduct constitutes a surrender by operation of law;
- (d) the Lessor shall be entitled to institute proceedings to recover damages as aforesaid either before or after any of the events or matters referred to in sub-paragraph (c);
- (e) any conduct by the Lessor to mitigate damages shall not of itself constitute acceptance of the Lessee's breach or repudiation or a surrender by operation of law; and
- (f) nothing herein expressed or implied shall be construed to mean that no other covenant herein on the part of the Lessee to be observed or performed may be an essential term.

EXECUTED as a Deed.

SCHEDULE

Item 1

Lessee's Name and Address:

~~Robert John WHITEFIELD
Gabrielle Dawn WHITEFIELD
RMB 14 WAINIMUP WA 6700~~

Item 2

Lot Number

Lot No. ~~14~~

Item 3

Term:

Twenty-one (21) years

Commencement Date:

1 July 1989

Expiry Date:

30 June 2010

Item 4

Annual Rent:

A clear annual rent of THREE HUNDRED AND SIXTY DOLLARS (\$360), reviewable annually.

Item 5

Manner of Payment of Rent:

Payable in advance on the 1st day of July each year.

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AIMS

- *To protect and enhance the unique special character of the Peaceful Bay original leasehold settlement as a relaxed, informal, low key holiday location.*
- *To provide guidance to both Council and leaseholders as to appropriate forms of development to ensure the character is maintained.*

OBJECTIVES

To ensure that any future development is in keeping with the heritage value of the precinct. Development includes any alteration or addition to any of the existing buildings.

Peaceful Bay Heritage Precinct is classified in the Shire of Denmark Town Planning Scheme as a “Place of Heritage Value”. These guidelines are intended as a planning tool to control inappropriate development or alteration of the elements within the precinct. The Shire of Denmark is responsible for managing alteration and development within the precinct, and is committed to adopting a commonsense approach to meeting the requirements of individual owners who wish to maintain and upgrade their houses.

This document is not intended to control any internal works unless they impact on the external fabric.

APPLICATION

- *All leasehold lots in the original Peaceful Bay leasehold settlement consisting of First Avenue to Fourth Avenue and from East Avenue to West Avenue.*
- *First, Second, Third, Fourth, East, Central and West Avenues roadways.*

1.0 INTRODUCTION

- 1.1 The small settlement of Peaceful Bay is located behind the primary sand dunes of Peaceful Bay on the south coast of Western Australia. The Peaceful Bay Heritage Precinct is the original leasehold subdivision of the settlement of Peaceful Bay.
- 1.2 The precinct consists of 163 houses constructed on small lots along four parallel roads- First, Second, Third and Fourth Avenues. These avenues are connected by East, Central and West Avenues.
- 1.3 Most of the houses were erected between 1959 and 1965. Some were relocated from the mill towns around the Shannon, and are small, simple gable cottages clad in jarrah weatherboards. Others were constructed on site and are reflective of the architectural styles of the 1950s and 1960s in Western Australia, having shallow pitched skillion roofs and clad in flat fibre cement sheeting.
- 1.4 The precinct has its own special character, which is that of a relaxed, informal, low-key holiday location. The elements are simple and minimal. Roads are single lane and paved with gravel (with the exception of First Avenue which has been bitumenised and partially kerbed). They often weave around pre-existing peppermints. The houses are simple rectangular structures, lacking in ornamentation. The materials and method of construction is homogenous. Most of the houses are timber framed and clad in either cement sheeting or jarrah weatherboards, or a mix of both. Roofs are either low pitched skillions or medium pitched gables and the roof sheeting is usually galvanised corrugated sheeting.
- 1.5 The houses are located informally on the blocks, with a wide variety of setbacks to all boundaries. There are very few fences. The predominant landscape elements are lawned areas which run between the houses and a large number of mature peppermints. There are a few areas where landscaped areas of exotic species have been planted.
- 1.6 A large proportion of the leases remain with the original leaseholders of their families, and this has created a strong sense of community within the Peaceful Bay Heritage Precinct. This community has a strong desire to retain the existing character and the heritage value of the Peaceful Bay Heritage Precinct.
- 1.7 For full details of this area the “Peaceful Bay Heritage Precinct Conservation Plan” (December, 2003) should be referred to.

2.0 THE HERITAGE VALUE OF THE PEACEFUL BAY HERITAGE PRECINCT

- 2.1 The heritage values of the Peaceful Bay Heritage Precinct are recognised by the community of the precinct and by the wider community.

- 2.2 The precinct is listed as a “Place of Heritage Value” on the Shire of Denmark Town Planning Scheme, and is also listed on the Shire of Denmark Municipal Heritage Inventory, category C.

3.0 THE USE OF THE PEACEFUL BAY HERITAGE PRECINCT

- 3.1 At the present time the precinct is zoned for “Parks and Recreation” in the Shire of Denmark Town Planning Scheme No. 3 and is used for holiday accommodation. There appear to be a number of permanent residents. This is a compatible use although care has to be taken that it does not introduce elements to the precinct that are inappropriate or alter elements that are significant. There also appear to be a number of home occupations operating in the precinct. Home occupations could be allowed in the precinct but need to be assessed by the Shire of Denmark according to their Town Planning Scheme. Home occupations which are noisy, disruptive, or which generate visitor traffic would not be allowed.

4.0 THE BUILDINGS

- 4.1 The buildings consist of 163 houses; one per lot, and three community buildings: the Progress Association Hall and the Sea Rescue Building on First Avenue and the Fire Brigade Building on West Avenue.
- 4.2 The houses are small, simple, structures. The form and materials are homogenous. The buildings are rectangular in shape and single storey.
- 4.3 The houses are all timber framed and walls are clad in either flat cement sheeting or jarrah weatherboards, or a mix of both. In some instances original jarrah board cladding has been replaced with flat cement sheeting. In other instances cladding has been replaced with an inappropriate cement board profile, e.g. hardiplank. In a few instances houses have recently been reclad in colorbonded corrugated steel. One house, no. 79, has been constructed in brick, although the scale and form of this house match the scale and form of the other houses in the precinct.
- 4.4 Roofs are usually either medium pitched gables or shallow pitched skillions and are clad in galvanised corrugated iron. There are a few roofs which are hipped or are shallow pitched front facing gables, and a few roofs have been clad in decromastic or concrete tiles or colorbonded corrugated steel.
- 4.5 A number of houses retain their original form and materials. Many have had skillion additions constructed to the rear. A number have had skillion additions constructed to the front. Recently a number of simple skillion verandahs have been constructed to the front of the houses.

4.5.1 Retention

Most of the houses have been classified in the Peaceful Bay Conservation Plan as having some cultural heritage significance, apart from no. 79, which is constructed of brick.

There should be no demolition or removal of any of the original sections of buildings that are classified as having some cultural heritage significance.

4.5.2 **Conservation and Maintenance**

The buildings which are classified as having considerable or some heritage value should be conserved and maintained.

4.5.3 **Reinstatement of Original Materials**

Wherever possible original finishes should be reinstated i.e. timber windows, galvanised iron roof sheeting, jarrah weatherboards, where these were known to exist.

4.5.4 **Intrusive Elements**

Elements that are considered intrusive should be removed or replaced when the opportunity arises. These include:

- decromastic and concrete roof tiles
- brickwork
- cement board cladding e.g. hardiplank
- colorbonded corrugated steel wall cladding
- colorbonded roof sheeting
- non corrugated profile water tanks
- over height antennae

4.5.5 **Front Additions and Setbacks**

There should be no addition to the front of the buildings, apart from small verandah additions, and houses which are set at the rear of the lots. This will conserve the variety of setbacks that contribute to the informal atmosphere of the precinct.

4.5.6 **Scale, Form and Materials for New Work**

Alteration and addition to the existing buildings will be permitted providing it is in a scale form and material which is similar to the authentic form, scale and materials; i.e.

- small,
- single storey,
- lightweight construction,
- simple rectangular form,
- medium pitched gable and/or low pitched skillion roof,
- corrugated profile roof sheeting,
- wall sheeting to be flat cement sheet and/or jarrah weatherboards,
- no brick, concrete, stone, or other ‘solid’ wall construction,
- no two storey construction,
- no decorative elements.

It is recognised that a small number of authentic buildings vary from the above, and in these instances the elements should reflect the authentic elements of the building in question, e.g. hipped roofs.

4.5.7 **New Verandahs and Balustrading**

The addition of small simple verandahs is permitted, but care should be taken not to introduce balustrading unless required by the BCA or for other reasons of safety, in which case it should be simple and unobtrusive.

4.5.8 **Services to the Building**

Services should be provided to the building with as little damage to significant fabric of the building as possible. Introduced elements should have minimal visual intrusion. Service elements that may be required to the buildings include plumbing and vent pipes, electricity supply lines, air conditioning, water heaters including solar water heaters and satellite dishes. These elements should be installed with minimal visual intrusion, at the rear of the houses. Antennae and other service elements should ideally not be visible from the street or other important viewing corridors.

4.5.9 **Colours**

It is recognised that colours are an individual choice and contribute to the charm of the precinct. However, the leaseholders are also encouraged to investigate original paint colours by means of wet and dry paint scrapes, and reinstate them.

4.5.10 **Size of Buildings**

Most of the houses are small, and this is an important characteristic which enables the informal character of the place to be retained by allowing the space between the houses for the large areas of lawn and mature peppermints which also contribute to the character of the place.

It is recommended that the size of the houses be limited to a plot ratio of .3 of the lots. The lots are 456 m²; a plot ratio of .3 limits the house size to 137 m².

Limit the sizes of the outbuildings to .2 of the lots. This enables outbuildings of 91.2 m² to be constructed.

4.5.11 **Maintenance**

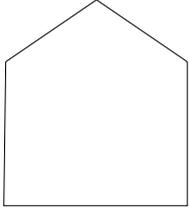
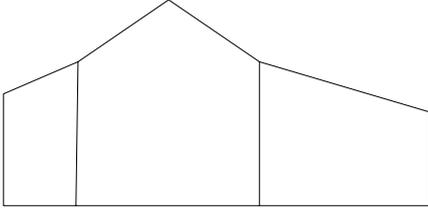
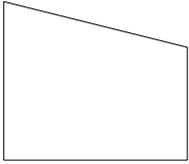
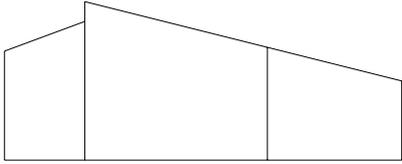
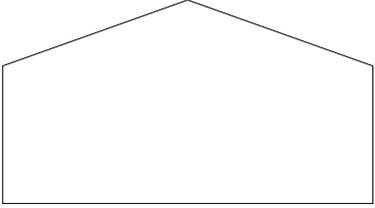
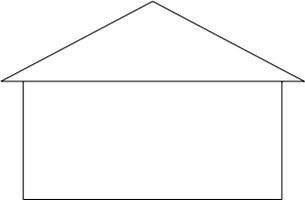
The houses should be maintained and repaired regularly in order that significant fabric is not lost. Unpainted jarrah weatherboards and other timber should be oiled. The buildings should be inspected regularly for termite infestation. Some buildings are in a poor state of repair and the lease condition of maintenance should be complied with to maintain the houses in a good state of repair.

4.5.12 **Other Buildings**

Should the opportunity arise, consideration should be give to refurbishing the Progress Association Hall and the Sea Rescue Building in a style that is more appropriate to the cultural heritage significance of the precinct, without mimicking any historicist style.

The Fire Brigade Building is also an industrial style building not in character with the rest of the precinct. It is proposed to relocate the fire equipment to another building outside the precinct. When this occurs, it would be preferable to remove the present building. If the community wishes to retain the building, the present cleared areas of gravel could be replanted with indigenous planting to lessen the impact of the scale of the building.

THE FORM OF THE HOUSES

 <p>Gable(Side View)</p>	 <p>Gable with Skillion Verandah And Rear Extension</p>
 <p>Skillion (Side View)</p>	 <p>Skillion with Front Verandah And Rear Extension</p>
 <p>Front Facing Gable</p>	
 <p>Hip</p>	

5.0 THE LOTS

5.1 Garages and Sheds

There should be no large garages and sheds at the front of the lots. Any existing garages and sheds at the front of the lots should be relocated when the opportunity arises.

5.2 Fencing

Fencing should be discouraged and the retention of the continuous large areas of lawn should be encouraged.

Super six fences and other solid fences including solid pickets should not be allowed. Any super six or solid fencing that exists should be removed or replaced when the opportunity arises.

Any new fencing should have low visual intrusion to a maximum of 900mm high and should reflect the predominant fencing which is small section post and rail with galvanised cyclone mesh or chicken mesh infill.

5.3 Amalgamation of Lots

The amalgamation of lots will not be permitted.

5.4 Density

One house per lot will be permitted.

5.5 Setbacks

Setbacks vary widely, some houses are built within two metres of the boundary, others are well set back on the lots. Side setbacks also vary widely. This adds to the informal character of the place, and in where the setbacks are more uniform, such as Fourth Avenue, the character is more formal and less intimate.

The variety of setbacks will be maintained by limiting additions to the front of the houses to small simple verandah additions.

There are a few houses which are set back close to the rear boundary, and this policy will need to be relaxed in these cases.

5.6 Service Elements

If required, service elements such as water meters and electrical mini pillars should be introduced to the lots with minimal visual intrusion, being mindful of the areas of lawn which are an important element of the precinct.

5.7 Driveways and Paths

There are very few driveways and paths in the precinct. These elements should be discouraged. Any driveways that are introduced to the lots should have minimal visual intrusion and should be appropriate to the precinct, e.g. red gravel with no hard edges would reflect the surface of the adjacent roadways.

6.0 LANDSCAPE

- 6.1 The landscaping elements that are predominant in the precinct and should be preserved are the large number of mature peppermint trees that provide a canopy of shade within the precinct, and the large areas of lawn with very few areas of other exotic planting. The lawned verges merge into the yards surrounding the properties to create an open flowing space around the houses.
- 6.2 There are some small pockets of indigenous plants other than peppermint trees and these should be conserved.
- 6.3 The precinct is surrounded by areas of native vegetation, in the adjacent caravan park to the east, the sand dunes to the south, the buffer zone between Fifth Avenue to the north and between the oval to the west. These areas should be preserved, maintained and reinstated where necessary.
- 6.4 All landscaping should be mindful of the Bush Fires Act and FESA requirements and
- a) Encourage the retention and replacement of peppermint trees. Appropriate methods of pruning the peppermints should be established according to specialist advice to maintain the canopy of shade that is an important characteristic of the place. The lopping of peppermint back to stumps should be prohibited.
 - b) Encourage the retention and maintenance of lawned verges and yards.
 - c) The planting of species that are exotic to the precinct in the front yards and visible side setbacks should be discouraged.
 - d) Retain the small pockets of indigenous plants that remain on the verges.
 - e) The areas of native vegetation that surround the precinct should be conserved and reinstated where possible.

7.0 STREETSCAPE

- 7.1 Important elements in the streetscape are:
- the single lane unsealed roadways that often curve around the peppermints,
 - the variety of set backs, to front, sides and rear, creating an informality to the streetscape,
 - the small plot ratio of most of the buildings which leave plenty of space between buildings,
 - the absence of driveways and paths,
 - the absence of kerbs and stormwater drains,
 - the absence of visually intrusive service elements such as sewer manholes, pits and meters,

- the minimal presence of other elements such as letter boxes,
- the absence of street lights,
- the absence of signs other than street signs although house names are often mounted on houses,
- the minimal use of fencing; any fences that do exist are usually of low visual impact. Often rear and side boundaries are not fenced.

7.2 **Roads**

Retain the form of the single lane road width and create a curved form of road plan in the streets where the roadway is not curved. Retain the gravel surface of the roads and if through traffic is discouraged from First Avenue, consider reinstating First avenue roadway to match the other roads in the precinct.

7.3 **Intrusive Elements**

Elements that have been identified as intrusive should be removed or replaced if the opportunity arises. These include the power poles, super six fences, large garages and sheds to the front of the lots, decromastic and concrete roof tiles, brickwork and over height antennae.

7.4 **Service Elements**

The installation of visually intrusive service elements such as sewer manholes and drains should be discouraged.

7.5 **Other Elements**

Other elements such as kerbs, and letter boxes should be discouraged.

7.6 **Signs**

The erection of signs other than street names should not be allowed. (House names mounted on the front walls of the houses are a feature of the precinct and it is recommended that these be permitted.)

7.7 **Fencing**

There are very few fences, particularly front fences, and this allows the verges and front lawns to sweep between the houses, giving a feeling of space and a relaxed atmosphere. Discourage the erection of fences. There should be no solid fences. Do not allow fences to be constructed in front of the dwellings. Any fencing should be set back from the front facades by one metre. Any fencing that is constructed should be “open” mesh type fences similar to the predominant style of fences existing in the precinct.

7.8 **Paving**

(See 5.7)

7.9 **Stormwater Drainage.**

Ensure that stormwater is directed away from the precinct with minimal visual intrusion to the precinct.

7.10 **Vehicular Access and Car Parking**

Most of the roads in the precinct are single lane gravel roads. These appear to be adequate and should be retained. There are very few driveways. Cars park in carports where these have been constructed, on the grassed lawns on the lots, and on the front verge. This works reasonably well. If the houses are to be occupied permanently, the provision of driveways may become a requirement, and if so, a surface that is appropriate should be used. Suggestions of appropriate surfaces include red gravel to match the existing roads, limestone gravel or other appropriate surface. Brick paving or grey/black bitumen is not considered appropriate.

7.11 **Power Supply**

The current electricity supply comes from overhead power lines that are supported on timber poles, and concrete poles. This is considered intrusive to the precinct, and should be replaced with underground power. Replace the present overhead power lines and poles and introduce underground power.

7.12 **Other Services**

It is likely that reticulated water and sewage will be introduced to the precinct. Services should be provided to the precinct with as little damage to significant fabric as possible. Care should be taken that introduced elements such as service pits and manholes etc are installed with minimal visual intrusion. The placement of the sewer should be given consideration whether to have the intrusive elements of the manholes in the road reserve where they will have maximum visual impact, or to set the sewer at the rear of the lots where significant fabric may be lost to enable the sewer line to be set in place.

7.13 **Electronic Equipment**

There are a number of over height antennae to the houses which are visually intrusive elements. A recently erected TV receiver means these over height TV antennae are no longer be required. The smaller antennae will still be required, however in the long term if technology allows for a system where TV antennae are no longer required, it would be preferable to remove the smaller antennae.

Radio antennae will still be required in the short term until technology is introduced that makes radio antennae obsolete.

If the community perceive the need for a mobile phone transmitting tower, this should also be located outside the precinct.

If satellite dishes are to be introduced to the precinct, this should also be done in a way that minimises visual intrusion.

7.14 **Street Lighting to the Precinct**

There is no street lighting in the precinct, and the community is keen that it not be introduced to the precinct. If street lighting becomes a requirement, it should be introduced to the precinct in a way that is appropriate to the cultural heritage significance of the precinct.

7.16 Carpark and Shop

The carpark to the north of the shop is part of the “entrance” to the precinct. Enhance the carpark and area around the shop to be more appropriate to the heritage value of the precinct.

8.0 DEVELOPMENT APPLICATIONS

- 8.1 All proposals to alter or renovate buildings/structures or erect new structures within the area covered by this Policy will require the submission of an application for planning consent as is the normal practice.
- 8.2 Applications in this area will need to show these development guidelines are being adhered to.

Adopted on 27th April, 2004 in accordance with clause 8.2 of Town Planning Scheme No. 3.

Denmark

level of significance

MUNICIPAL HERITAGE INVENTORY

Exceptional

Original Peaceful Bay Settlement

**Place Details**

Place Name:	Original Peaceful Bay Settlement
Other Name:	
Place Type:	Village
Original Use:	Holiday Destination
Current Use:	Holiday Destination
Lot/Location No.:	CR 24510
Address:	First, Second, Third, Fourth, Central, West and East Avenues. Peaceful Bay
Locality:	
Map Reference:	
HCWA Number:	
ASS Number:	3104
Description:	
Walls:	Various - timber/ brick
Roof:	Corrugated Iron
Condition:	Fair
Integrity:	Integrity of a small simple community not seeking rapid progress and change remains intact

The original Peaceful Bay Settlement is the original leasehold subdivision of the settlement and consists of 163 small lots which were created incrementally between 1957 and 1964, as a part time holiday destination. The settlement is unique in Western Australia and has its own special character which is that of a relaxed, informal, low-key holiday locations with a predominantly 1960's aesthetic.

The houses are simple inexpensive structure, lacking in ornamentation. The materials and method of construction is homogenous. Most of the houses are timber framed and clad in either cement sheeting or jarrah weatherboards, or a mix of both. Roofs are either low pitched skillions or medium pitched gables and the roof sheeting is usually galvanised corrugated sheeting.

The houses are located informally on the blocks, with a wide variety of setbacks to all boundaries, although all the houses are set parallel to the boundaries. There are very few fences. The predominant landscape elements are lawned areas which run between the houses and a large number of mature peppermints. There are few areas where exotic species have been planted.

A large proportion of the leaseholders came from the farming communities of the Great Southern, particularly the Kojonup/Cranbrook/Katanning areas and the area around Manjimup and the Shannon. These rural communities brought the quality of openness to the settlement and their ability to improvise and make do to the construction of the holiday shacks. A large portion of the leases remains with the original leaseholders or their descendants which creates a very strong sense of community.

The unique character of the original settlement lies both in its physical appearance and in the very strong sense of community that exists between the people who occupy it. This character is highly valued by the leaseholders and the wider community.

History

Construction Date: 1957-1964

Architect:

Builder:

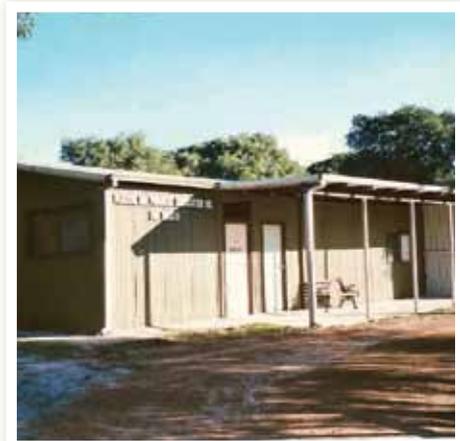
Significance

Historic Theme: Demographic settlement

Sub Theme: Settlements

The Original Peaceful Bay Settlement has cultural heritage significance for the following reasons:

- The place is highly valued by the community for its aesthetic character and its relaxed and informal atmosphere. The aesthetic character of the settlement is that of a simple and minimal beachside development of the 1960s and is created by a combination of different factors including a dense grid like pattern of small simple houses; homogeneity of the form and materials of the houses; informality and variety in the setout of the buildings on the blocks; narrow gravel roads; large areas of lawn which flow from the road edge around the houses; large numbers of mature peppermints which provide a canopy of shade throughout the settlement and which surround the settlement; and the absence of other elements apart from a few simple fences.



- The place has been the holiday place of many leaseholders over a long period of time. This grouping of like-minded people with a common philosophy and similar lifestyle has created a close-knit community who have a deep sense of attachment to the place.
- The place is highly valued by the local community of leaseholders and regular visitors to the area. This was formalised through the formation of the Peaceful Bay Progress Association in 1961. The Association continues provide improved amenities and services through its own fund-raising and labour efforts, as well as by lobbying government authorities.
- the place was one of the first subdivisions in Western Australia of leasehold land released for the construction of beach cottages for short-term occupancy and served as a model for later subdivisions;
- The place provides a good example of an intact beach shack settlement in Western Australia. As a planned settlement under leasehold conditions, the cottages that make up the Original Peaceful Bay Settlement are not under threat of removal. The majority of squatter shack settlements on the Western Australian coast are not under formal tenure and have been removed as the result of government policy.
- The place is representative of the trend towards extended beach-side holidays that emerged in the 1950s as Australian families became more affluent and mobile. In Western Australia, this was exemplified by farmers and graziers from the hinterlands who sought isolated coastal beaches for inexpensive family holidays. As a spot became favoured, many established permanent camps in the form of beach shacks and cottages. The Original Peaceful Bay Settlement provides a good example of this, though it is more formalised than many of the shack settlements on the Western Australian coast.

Level of Significance

Exceptional

Essential to the heritage of the locality. Rare or outstanding example. The place should be retained and conserved unless there is no feasible and prudent alternative to doing otherwise. Any alterations or extensions should reinforce the significance of the place, and be in accordance with a Conservation Plan (if one exists for the place).

Supporting Information

David Heaver and Associates Architects, Peaceful Bay
Heritage Precinct Conservation Plan, December 2003

Previous Listing

Assessment Date 1999

